

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1.
INTRODUCTION/(1) WHAT IS MEANT BY THE CONFLICT OF LAWS/1. Nature of the subject.

CONFLICT OF LAWS (

1. INTRODUCTION

(1) WHAT IS MEANT BY THE CONFLICT OF LAWS

1. Nature of the subject.

The branch of English law¹ known as the conflict of laws (or private international law², in contradistinction to both the ordinary local or domestic law of England and public international law³) is concerned with cases having a foreign element. By a 'foreign element' is meant a contact with some system of law other than English law. Such a contact may exist, for example, because a contract was made or to be performed in a foreign country⁴, or because a tort was committed there, or because property was situated there, or because the parties are not English⁵. In the conflict of laws, 'foreign element' and 'foreign country' mean a non-English element and a country other than England; and Scotland or Northern Ireland is for many purposes as much a foreign country as France or Germany.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 post.

2 For a discussion of the various names given to the subject see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 32.

3 See para 2 post.

4 For the meaning of 'country' see para 3 post.

5 I.e English by domicile (see para 35 et seq post) or by residence (see paras 57-61 post). Traditionally, nationality is not a factor to which weight is attached in the English rules of the conflict of laws, because of the difficulty of determining the national law of a British subject (see para 10 note 5 post). However, as it is a relevant factor in the conflict of laws rules of many continental European countries, there is an increasing tendency for English statutes implementing international conventions on the conflict of laws to refer to a person's national law: see eg the Wills Act 1963 (see para 451 post); and the Family Law Act 1986 (see para 253 et seq post).

UPDATE

1 Nature of the subject

TEXT AND NOTES--See also European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) on the law applicable to non-contractual obligations; European Parliament and EC Council Regulation 593/2008 (OJ L177, 4.7.2008, p 6) on the law applicable to contractual obligations, which applies in substance from 17 December 2009 (see EC Commission Decision 2009/26 (OJ L10, 15.1.2009, p 22) art 2). See also the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2009, SI 2009/3075.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(1) WHAT IS MEANT BY THE CONFLICT OF LAWS/2. Public and private international law.

2. Public and private international law.

The conflict of laws has little in common with public international law¹, which seeks primarily to regulate the relations between different sovereign states, and is, at any rate in theory, the same everywhere². The conflict of laws is not a shared body of international law but a necessary part of the domestic law of every country³. When events or transactions involving civil and commercial matters are not confined within the borders of a single country, the indigenous legal systems of the different countries involved may have substantive laws that govern the subject matter of the legal dispute in very different ways. Conflict of laws rules allow for some necessary adjustment between these different substantive laws.

1 See para 1 ante.

2 For the principles of public international law see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 2 et seq.

3 Even between England and Scotland there are some significant differences in the conflict of laws rules that operate, but a more fundamental difference can be discerned between the common law countries on the one hand (ie England and other countries such as Australia, New Zealand and the United States) and countries with a codified legal system on the other hand (such as the continental European countries). In this title, the term 'English domestic law' is used to refer specifically to English law excluding its conflicts of law rules. As to the meanings of 'England', 'English' and 'English law' see para 4 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1.
INTRODUCTION/(1) WHAT IS MEANT BY THE CONFLICT OF LAWS/3. Meaning of 'country'.

3. Meaning of 'country'.

For the purposes of the conflict of laws, territories are separated by their systems of law rather than by political or geographical divides; a 'state' within the meaning given to it in public international law may or may not coincide with a 'country' in the sense used in the conflict of laws. The meanings of 'state' and 'country' may indeed coalesce in the case of unitary states such as France, Italy and New Zealand because the law is the same throughout the state. However, each of England¹, Scotland and Northern Ireland is a country in the sense used in the conflict of laws (because each has a separate legal system) but none is a state recognised in public international law². For some purposes, larger units than these may constitute countries. For example, the United Kingdom is one country for purposes of the law of bills of exchange³; and Great Britain is one country for most purposes of the law of companies⁴.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 post.

2 Similarly, each of the Australian and American states and each Canadian province is normally a separate entity for the purpose of the conflict of laws. It has been held that the United States may be regarded as a country for the purposes of the jurisdiction of the federal court: see *Adams v Cape Industries plc* [1990] Ch 433; affd without deciding this point [1990] Ch 433, CA. However, Wales is not regarded as a separate country for the purposes of the conflict of laws because its system of law is the same as that of England: see para 4 post. As to the legislative powers of the National Assembly for Wales see CONSTITUTIONAL LAW AND HUMAN RIGHTS. As to the meaning of 'country' for the purpose of the conflict of laws see further Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 26-27.

3 See the Bills of Exchange Act 1882 s 4(1); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1432. For the meaning of 'United Kingdom' see para 4 post.

4 See the Companies Act 1985; and COMPANIES. For the meaning of 'Great Britain' see para 4 post.

UPDATE

3 Meaning of 'country'

NOTE 4--Companies Act 1985 replaced for the most part by Companies Act 2006.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1.
INTRODUCTION/(1) WHAT IS MEANT BY THE CONFLICT OF LAWS/4. Geographical definitions.

4. Geographical definitions.

In this title 'the United Kingdom' means Great Britain and Northern Ireland¹; 'Great Britain' means England, Scotland and Wales²; and 'the British Isles' or 'the British Islands' means the United Kingdom, the Channel Islands and the Isle of Man³.

In older statutes 'England' included the principality of Wales, Monmouthshire and the town of Berwick on Tweed⁴; modern statutes refer separately to England and Wales, and those terms are defined by reference to local government boundaries⁵.

Throughout this title the terms 'English law' and 'law of England' refer, in line with convention, to the law of England and Wales, since Wales does not have a separate jurisdiction, and 'English' and 'England', in relation to courts and jurisdiction, should be construed accordingly.

1 Interpretation Act 1978 s 5, Sch 1. Cf the definition of 'part of the United Kingdom' contained in the Civil Jurisdiction and Judgments Act 1982 s 50: see para 66 note 3 post.

2 See the Union with Scotland Act 1706, preamble, art I.

3 See the Interpretation Act 1978 Sch 1.

4 See the Wales and Berwick Act 1746 s 3 (repealed); and the Interpretation Act 1978 s 22, Sch 2 para 5(a). For an example of a statute defining 'England' as including Wales see the Maintenance Orders Act 1950 s 28(1); and para 293 post.

5 The Interpretation Act 1978 provides that 'England' means, subject to any alteration of boundaries under the Local Government Act 1972 Pt IV (ss 46-78) (as amended), the areas consisting of the counties established by s 1, Greater London and the Isles of Scilly. See LOCAL GOVERNMENT vol 69 (2009) PARA 24. In relation to England, the provisions of the Local Government Act 1972 Pt IV (ss 46-78), relating to changes in local government areas, are largely repealed: see the Local Government Act 1992 s 29, Sch 4 Pt II. However, this repeal does not affect the continuing validity of any provision contained in any order made under the Local Government Act 1972 Pt IV: see the Local Government Act 1992 s 29(3). See LOCAL GOVERNMENT vol 69 (2009) PARA 56. As to local government areas generally see LOCAL GOVERNMENT vol 69 (2009) PARA 22 et seq; and as to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) para 29.

The Interpretation Act 1978 provides also that 'Wales' means the combined areas of the counties created by the Local Government Act 1972 s 20, as originally enacted, but subject to any alteration made under s 73 (as amended) (consequential alteration of boundary following alteration of watercourse): see the Interpretation Act 1978 Sch 1 (definition substituted by the Local Government (Wales) Act 1994 Sch 2 para 9). The Welsh Language Act 1967 s 4 (repealed) provided that references to England in future Acts of Parliament were no longer to include Wales. See CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 41.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(1) WHAT IS MEANT BY THE CONFLICT OF LAWS/5. Jurisdiction and choice of law.

5. Jurisdiction and choice of law.

The questions that arise in conflict of laws cases are: (1) whether the English¹ court has jurisdiction to entertain the case; and (2) if so, what system of law, English or foreign, it should apply. There may sometimes be a third question, namely, whether the English court will recognise or enforce a foreign judgment purporting to determine the issue between the parties.

There are many situations in which, if the English court has jurisdiction, it will apply English domestic law². Conversely, there are many situations in which, if a foreign court has jurisdiction according to English conflict of laws rules, its judgment will be recognised or enforced in England, regardless of the grounds on which it was based or the choice of law rules which the foreign court applied³. Thus, in English conflict of laws cases, questions of jurisdiction frequently tend to overshadow questions of choice of law⁴.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See eg para 244 post (divorce and judicial separation).

3 See eg para 253 et seq post (divorce, judicial separation and annulment of marriage).

4 As to jurisdiction generally see para 62 et seq post.

UPDATE

5 Jurisdiction and choice of law

TEXT AND NOTES--The Mental Capacity Act 2005 Sch 3 makes provision in relation to persons who cannot protect their interests, governing which jurisdiction should apply when a national of one country is in another state: see Mental Capacity Act 2005 Sch 3; and PARA 14A.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(2) APPLICATION OF FOREIGN LAW/6. Renvoi.

(2) APPLICATION OF FOREIGN LAW

6. Renvoi.

Where choice of law rules determine that English law¹ governs a case, the matter is decided according to English domestic law. However, where a foreign law governs a case by virtue of the English rules as to choice of law, the English court must decide whether to apply the domestic law of the foreign country, that is, the law applicable in that country to a case having no material connection with any other country², or whether to apply the whole of the law of the foreign country, including its rules as to the conflict of laws³. If the latter course is adopted, it may be that the foreign country's rules as to the conflict of laws make a reference back, or 'renvoi', as it is called, to the law of England⁴, and in that event the English court must decide whether to accept the renvoi and apply its own internal law⁵ or how otherwise to deal with the case.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 This was recommended in *Re Annesley, Davidson v Annesley* [1926] Ch 692 at 709; *Re Askew, Marjoribanks v Askew* [1930] 2 Ch 259 at 278. It is the course usually adopted by the English court: see para 10 post.

3 This was preferred in *Re Ross, Ross v Waterfield* [1930] 1 Ch 377, especially at 389-390, after a full review of the authorities. See para 7 post.

4 Where renvoi results in a case being referred back to the forum this is known as remission; where the reference is to the law of a third country this is called transmission, and the English court may apply that law, as in *Re Trufort, Trafford v Blanc* (1887) 36 ChD 600 and in *Re Johnson, Roberts v A-G* [1903] 1 Ch 821.

5 This is the doctrine of 'partial renvoi' or 'single renvoi'. See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 66-67, where it is suggested that this is not the approach currently favoured by English courts, which prefer the doctrine of 'total renvoi' or 'double renvoi', at least in certain contexts: see para 7 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(2) APPLICATION OF FOREIGN LAW/7. Total renvoi.

7. Total renvoi.

In those cases in which the English court¹ applies the whole law of a foreign country, including its rules as to the conflict of laws, it will decide the case in the same manner as would the court of that foreign country having regard to all the actual facts of the case which it would consider relevant². This method of dealing with the matter is in accordance with what is known as the 'doctrine of total renvoi' or 'foreign court doctrine'³.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See *Re Ross, Ross v Waterfield* [1930] 1 Ch 377, especially at 389-390; and see the cases cited in para 10 notes 2-6 post. English law will, however, apply to matters of procedure as the *lex fori*. As to the *lex fori* see para 11 post.

3 See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 67.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1.
INTRODUCTION/(2) APPLICATION OF FOREIGN LAW/8. Difficulties of total renvoi doctrine.

8. Difficulties of total renvoi doctrine.

Certain difficulties may arise in the application of the total renvoi doctrine. First, it involves the English court¹ in the ascertainment of the rules of the conflict of laws of a foreign country, including its rules as to renvoi, and that ascertainment may in certain cases present much difficulty². Secondly, the doctrine cannot be applied if the law of the foreign country also adopts the same doctrine, as otherwise a vicious circle or endless oscillation backwards and forwards from one law to the other would result³. If such a case were to come before an English court⁴, it is thought that the domestic law of the foreign country would be applied by the English court⁵.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See eg *Re Annesley, Davidson v Annesley* [1926] Ch 692 at 706-708; *Re Askew, Marjoribanks v Askew* [1930] 2 Ch 259 at 277-278; *Re Duke of Wellington, Glentanar v Wellington* [1947] Ch 506 at 515, [1947] 2 All ER 854 at 858-859 (on appeal without referring to this point [1948] Ch 118, [1947] 2 All ER 854, 864, CA).

3 *Re Annesley, Davidson v Annesley* [1926] Ch 692 at 709; *Re Ross, Ross v Waterfield* [1930] 1 Ch 377 at 389, contra at 389-390; *Re Askew, Marjoribanks v Askew* [1930] 2 Ch 259 at 267. See also the First Report of the Private International Law Committee (Cmnd 9068) (1954) para 23; and Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 78.

4 At the date at which this volume states the law, no such case is known to have arisen.

5 *Casdagli v Casdagli* [1918] P 89 at 111, CA; on appeal [1919] AC 145, HL.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1.
INTRODUCTION/(2) APPLICATION OF FOREIGN LAW/9. The 'incidental question'.

9. The 'incidental question'.

An 'incidental question' may arise under the foreign law chosen by a country's conflicts rules which can be solved only by applying a further conflicts rule to govern that question alone. Uncertainty may arise over whether that further conflicts rule should be that of the foreign law (*lex causae*) or that of the law of the forum (*lex fori*)¹.

¹ See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 45-52. For an example of an incidental question arising see para 230 note 2 post. As to the *lex causae* and the *lex fori* see para 11 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1.
INTRODUCTION/(2) APPLICATION OF FOREIGN LAW/10. Scope of the renvoi doctrine.

10. Scope of the renvoi doctrine.

Where a foreign law governs a case by virtue of English¹ conflict of laws rules, the English court usually applies the domestic law of the foreign country². The doctrine of renvoi has been applied primarily to cases of succession to movables³ and immovables⁴, as where a British national dies domiciled in a country by whose law succession is governed by the *lex patriae* (that is, the law of the nationality)⁵. Apart from such cases, the doctrine seems only to have been applied in a case of legitimation by subsequent marriage⁶. It also seems to be applicable as an alternative method of upholding the formal validity of a marriage, so that it will be formally valid if it complies either with the domestic rules or with the conflict rules of the *lex loci celebrationis* (that is, the law of the place where the marriage was celebrated)⁷. There is a strong case for the application of the doctrine to cases concerning the title to movables⁸ or immovables⁹ situated abroad.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) Ch 4 Rule 1; and at pp 71-72. The doctrine does not apply in cases of contract: see the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L226, 9.10.80, p 1) art 15 (set out in the Contracts (Applicable Law) Act 1990 s 2(1), Sch 1); and para 349 et seq post. See also *Re United Railways of Havana and Regla Warehouses Ltd* [1960] Ch 52 at 96-97, 115, [1959] 1 All ER 214 at 236, 246, CA (exclusion of renvoi at common law). It has been excluded also from consideration in tort cases: see the Private International Law (Miscellaneous Provisions) Act 1995 s 9(5); and para 368 post. Nor does renvoi apply to the formal validity of wills in cases governed by the Wills Act 1963: see ss 1, 2, 6(1); and para 451 note 3 post.

3 *Collier v Rivaz* (1841) 2 Curt 855; *Frere v Frere* (1847) 5 Notes of Cases 593; *Re Trufort, Trafford v Blanc* (1887) 36 ChD 600; *Re Brown-Séquard* (1894) 70 LT 811; *Re Johnson, Roberts v A-G* [1903] 1 Ch 821 (disapproved on another point in *Casdagli v Casdagli* [1918] P 89, CA (on appeal [1919] AC 145, HL); *Re Annesley, Davidson v Annesley* [1926] Ch 692; *Re Ross, Ross v Waterfield* [1930] 1 Ch 377; *Re Askew, Marjoribanks v Askew* [1930] 2 Ch 259); *Re Annesley, Davidson v Annesley* supra; *Re Ross, Ross v Waterfield* supra; *Re O'Keefe, Poingdestre v Sherman* [1940] Ch 124, [1940] 1 All ER 216; *Re Fuld's Estate (No 3), Hartley v Fuld* [1968] P 675, [1965] 3 All ER 776. Cf *Enohin v Wylie* (1862) 10 HL Cas 1; *Abd-ul-Messih v Farra* (1888) 13 App Cas 431 at 444-445, PC. See para 444 post.

4 *Re Ross, Ross v Waterfield* [1930] 1 Ch 377; *Re Duke of Wellington, Glentanar v Wellington* [1947] Ch 506, [1947] 2 All ER 854 (on appeal without referring to this point [1948] Ch 118, [1947] 2 All ER 854, 864, CA), following *Kotia v Nahas* [1941] AC 403, [1941] 3 All ER 20, PC. See para 444 post.

5 The ascertainment of the national law may give rise to questions of great difficulty. In *Re Johnson, Roberts v A-G* [1903] 1 Ch 821 at 826, and in *Re O'Keefe, Poingdestre v Sherman* [1940] Ch 124 at 129, [1940] 1 All ER 216 at 218, it was assumed, without evidence of foreign law, that this is the domicile of origin, but this is questionable: the question ought to be decided as the foreign court would decide it.

6 *Re Askew, Marjoribanks v Askew* [1930] 2 Ch 259. See para 340 post.

7 *Taczanowska (otherwise Roth) v Taczanowski* [1957] P 301 at 305, [1956] 3 All ER 457 at 460; on appeal [1957] P 301 at 318, [1957] 2 All ER 563 at 566, CA. As to the *lex loci celebrationis* see para 208 post.

8 See *Glencore International AG v Metro Trading Inc* [2001] 1 Lloyd's Rep 284 at 297; and para 405 post.

9 See the cases cited in note 3 supra; *Bank of Africa Ltd v Cohen* [1909] 2 Ch 129 at 146-147, CA. See further para 399 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1.
INTRODUCTION/(3) LAW GOVERNING PROCEDURAL MATTERS/11. Lex fori governs procedure.

(3) LAW GOVERNING PROCEDURAL MATTERS

11. Lex fori governs procedure.

Whereas matters of substantive law are governed by the *lex causae*, namely the law applicable under the English rules for the choice of law, all matters of procedure are governed by the *lex fori*, namely the law of the country in which the action is brought¹. It is not always easy to classify rules of law into those which are substantive and those which are procedural, but, generally speaking, it may be said that substantive rules give or define the right which it is sought to enforce and procedural rules govern the mode of proceeding or machinery by which the right is enforced². Whether an issue is a procedural or substantive one is one of authority rather than principle, and it is a matter which creates obvious differences between legal systems and how they operate. The following paragraphs deal with matters raising questions of procedure³.

¹ *Melan v Duke de Fitzjames* (1797) 1 Bos & P 138 at 142; *British Linen Co v Drummond* (1830) 10 B & C 903; *De la Vega v Vianna* (1830) 1 B & Ad 284; *Trimbey v Vignier* (1834) 1 Bing NC 151 at 159; *Huber v Steiner* (1835) 2 Bing NC 202; *Don v Lippmann* (1837) 5 Cl & Fin 1 at 13, HL; *General Steam Navigation Co v Guillou* (1843) 11 M & W 877 at 895; *Leroux v Brown* (1852) 12 CB 801; *Chaplin v Boys* [1971] AC 356 at 378-379, [1969] 2 All ER 1085 at 1092-1093, HL, per Lord Hodson, at 380-383 and 1093-1096 per Lord Guest, at 392-393 and 1104-1105 per Lord Wilberforce, and at 393-395 and 1105-1107 per Lord Pearson; cf *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 606-607, [1970] 1 All ER 796 at 801, HL, per Lord Hodson, at 616 and 809-810 per Lord Wilberforce (law governing arbitration procedure). See also *Re Fuld's Estate (No 3)*, *Hartley v Fuld* [1968] P 675 at 695, [1965] 3 All ER 776 at 779. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

² *Poyser v Minors* (1881) 7 QBD 329 at 333, CA; and see *Re Shoesmith* [1938] 2 KB 637, [1938] 3 All ER 186, CA.

³ See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 33-45.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1.
INTRODUCTION/(3) LAW GOVERNING PROCEDURAL MATTERS/12. Service of process.

12. Service of process.

Matters relating to the service of process¹ are procedural and are determined by the lex fori².

1 'Service' means the steps required by rules of court to bring documents used in court proceedings to a person's attention: see CPR 2.2(1), Glossary. As to service generally see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq. As to acknowledgment of service see CIVIL PROCEDURE vol 11 (2009) PARAS 184-186.

2 *Dobson v Festi, Rasini & Co* [1891] 2 QB 92, CA. As to the lex fori see para 11 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1.
INTRODUCTION/(3) LAW GOVERNING PROCEDURAL MATTERS/13. Mode of trial and time for
appealing.

13. Mode of trial and time for appealing.

All matters relating to the mode of trial of an action, such as whether there is a right to trial by jury, are for the *lex fori*¹. The period within which an appeal against judgment in an action may be entered is also governed by the *lex fori*².

¹ *Don v Lippmann* (1837) 5 Cl & Fin 1 at 14-15, HL; *General Steam Navigation Co v Guillou* (1843) 11 M & W 877 at 895. As to the evidence admissible at the trial see paras 15-18 post. As to the *lex fori* see para 11 ante.

² *Lopez v Burslem* (1843) 4 Moo PCC 300.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(3) LAW GOVERNING PROCEDURAL MATTERS/14. Parties.

14. Parties.

Rules determining whether a person is capable of suing or being sued, such as a rule relating to the question whether an action may be brought in the name of a dead man¹, or a rule relating to the question of whether an action may be brought by or against a dissolved corporation², or an international organisation³, or a state⁴, or an inanimate object⁵, are procedural and are thus governed by the *lex fori*⁶.

The question whether a party may sue or be sued in a representative capacity is sometimes a matter for the *lex causae*⁷, and in other cases a matter for the *lex fori*. The *lex causae* will determine whether a trustee in bankruptcy⁸, liquidator⁹, receiver¹⁰, administrator of enemy property¹¹, or curator of a mentally disordered person¹² may sue or be sued; and if under that law he may, the *lex fori* will acknowledge his title. But the *lex fori* alone governs in the cases of administrators of deceased persons, whose foreign appointment is ineffective in England¹³, and curators of disappeared persons¹⁴; and in England such persons may neither sue nor be sued. English courts will not recognise a judicial administrator's right to sue in a person's absence¹⁵.

Rules determining whether a party to a particular action before the court is the proper claimant or the proper defendant are sometimes procedural and sometimes substantive¹⁶. Thus a rule relating to the question whether an assignee of a chose in action may bring an action in his own name is regarded as procedural where the rule is not intended to have extra-territorial effect¹⁷, and as substantive in other cases¹⁸. Similarly, a rule which regards the defendant as being liable, but makes his liability dependent upon other persons being sued first, is procedural¹⁹, whereas a rule which regards him as not being liable at all unless other persons are sued first is substantive²⁰. Again, an action may be available in England against a defendant for breach of an obligation governed by a foreign law, which, by reason of the particular circumstances, although valid and subsisting, is not actionable at all by the foreign procedural law²¹.

1 *Banque Internationale de Commerce de Petrograd v Goukassow* [1923] 2 KB 682 at 691, CA; revsd on the facts [1925] AC 150, HL.

2 *Banque Internationale de Commerce de Petrograd v Goukassow* [1923] 2 KB 682, CA (revsd on the facts [1925] AC 150, HL); *Lazard Bros & Co v Banque Industrielle de Moscou* [1932] 1 KB 617, CA (affd sub nom *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, HL); *Russian and English Bank v Baring Bros & Co Ltd* [1932] 1 Ch 435, CA. Cf *Toprak Enerji Sanayi AS v Sale Tilney Technology plc* [1994] 3 All ER 483, [1994] 1 WLR 840 on the application of this rule where one company merges with another, and is then dissolved; not followed in *Industrie Chimiche Italia Centrale v Alexander Tsavrilis & Sons Maritime Co, The Choko Star* [1996] 1 All ER 114. As to the law governing the question of whether a corporation has been dissolved see para 468 post.

3 *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, sub nom *MacLaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523, HL. However, the *lex fori* may recognise legal personality arising under a foreign law and so permit the party to sue: *Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114, [1991] 1 All ER 871, HL; *Westland Helicopters Ltd v Arab Organisation for Industrialisation* [1995] QB 282, [1995] 2 All ER 387 (proper law of the organisation was public international law established by governing treaty).

4 See generally the State Immunity Act 1978; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 244 et seq.

5 However, the *lex fori* may recognise legal personality arising under a foreign law: *Bumper Development Corp v Metropolitan Police Comr* [1991] 4 All ER 638, [1991] 1 WLR 1362, CA (Hindu temple).

6 See para 11 ante; and see generally CIVIL PROCEDURE vol 11 (2009) PARAS 207-209. The lex fori may recognise legal personality arising under another law, and having done so, permit such a person to sue or be sued as such.

7 As to the lex causae see para 11 ante.

8 *Smith v Buchanan* (1800) 1 East 6 at 11; *Macaulay v Guaranty Trust of New York* (1927) 44 TLR 99; *Kamouh v Associated Electrical Industries International Ltd* [1980] QB 199 at 206, [1979] 2 WLR 795 at 800. See also para 504 post.

9 *Bank of Ethiopia v National Bank of Egypt and Ligouri* [1937] Ch 513; *Kamouh v Associated Electrical Industries International Ltd* [1980] QB 199 at 206, [1979] 2 WLR 795 at 800. See also para 507 post.

10 *Schemmer v Property Resources Ltd* [1975] Ch 273, [1974] 3 All ER 451; *Kamouh v Associated Electrical Industries International Ltd* [1980] QB 199 at 206, [1979] 2 WLR 795 at 800. Cf *Perry v Zissis* [1977] 1 Lloyd's Rep 607 at 615, CA.

11 *Lepage v São Paulo Copper Estates Ltd* [1917] WN 216.

12 *Didisheim v London and Westminster Bank Ltd* [1900] 2 Ch 15, CA; *Kamouh v Associated Electrical Industries International Ltd* [1980] QB 199 at 206, [1979] 2 WLR 795 at 800.

13 See *New York Breweries Co Ltd v A-G* [1899] AC 62; *Kamouh v Associated Electrical Industries International Ltd* [1980] QB 199 at 206, [1979] 2 WLR 795 at 800; and see para 439 post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

14 *Kamouh v Associated Electrical Industries International Ltd* [1980] QB 199, [1979] 2 WLR 795.

15 *Kamouh v Associated Electrical Industries International Ltd* [1980] QB 199, [1979] 2 WLR 795.

16 See the text and notes 17-21 infra. A person cannot enforce a right which has vested not in him but in someone else under the lex causae: *Ross v Bhagvat Sinhjee* (1891) 19 R 31, Ct of Sess; cf *Hartmann v König* (1933) 50 TLR 114, HL. Similarly a person cannot be liable if, by the lex causae, the liability falls not on him but on someone else: *General Steam Navigation Co v Guillou* (1843) 11 M & W 877; *Armagas Ltd v Mundogas SA* [1986] AC 717, [1985] 3 All ER 795, CA (affd on other grounds [1986] AC 717 at 773, [1986] 2 All ER 385, HL). Cf *The Mary Moxham* (1876) 1 PD 107, CA.

17 *Jeffery v M'Taggart* (1817) 6 M & S 126; *Barber v Mexican Land and Colonization Co Ltd* (1899) 16 TLR 127.

18 *Innes v Dunlop* (1800) 8 Term Rep 595; *O'Callaghan v Marchioness Thomond* (1810) 3 Taunt 82; cf *Trimbey v Vignier* (1834) 1 Bing NC 151. See, however, *Wolff v Oxholm* (1817) 6 M & S 92 at 99 (where English law was both the lex fori and the lex causae). The question whether a trustee in bankruptcy may sue in his own name is substantive: *Alivon v Furnival* (1834) 1 Cr M & R 277.

19 *General Steam Navigation Co v Guillou* (1843) 11 M & W 877; *Bullock v Caird* (1875) LR 10 QB 276; *Re Doetsch, Matheson v Ludwig* [1896] 2 Ch 836; *Johnson Mathey & Wallace Ltd v Alloush* (1984) 135 NLJ 1012, CA.

20 *General Steam Navigation Co v Guillou* (1843) 11 M & W 877; *The Mary Moxham* (1876) 1 PD 107, CA.

21 See *Hansen v Dixon* (1906) 96 LT 32 (action for breach of promise of marriage made in Denmark, the promise being valid in Denmark, but in the particular circumstances of the case not enforceable there). As to statutes of limitation see para 26 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(3) LAW GOVERNING PROCEDURAL MATTERS/14A. International protection of adults.

14A. International protection of adults.

1. Jurisdiction of competent authority

The court may exercise its functions under the Mental Capacity Act 2005 (in so far as it cannot otherwise do so) in relation to (1) an adult¹ habitually resident² in England and Wales, (2) an adult's property in England and Wales, (3) an adult present in England and Wales or who has property there, if the matter is urgent, or (4) an adult present in England and Wales, if a protective measure³ which is temporary and limited in its effect to England and Wales is proposed in relation to him⁴.

The court may also exercise its functions under the Mental Capacity Act 2005 (in so far as it cannot otherwise do so) in relation to an adult if⁵ (a) he is a British citizen, he has a closer connection with England and Wales than with Scotland or Northern Ireland, and specified provision⁶ has, in relation to the matter concerned, been complied with⁷ or (b) the Lord Chancellor, having consulted such persons as he considers appropriate, agrees to a request⁸ in relation to the adult⁹.

Where jurisdiction is exercisable under Schedule 3 to the Mental Capacity Act 2005¹⁰ in connection with a matter which involves a Convention country¹¹ other than England and Wales, any Article of the Hague Convention on which the jurisdiction is based applies in relation to the matter in so far as it involves the other country (and the court must, accordingly, comply with any duty conferred on it as a result)¹².

1 'Adult' means a person who (1) as a result of an impairment or insufficiency of his personal faculties, cannot protect his interests, and (2) has reached 16: Mental Capacity Act 2005 Sch 3 para 4.

2 An adult present in England and Wales is to be treated for the purposes of *ibid* Sch 3 para 7 as habitually resident there if (1) his habitual residence cannot be ascertained, (2) he is a refugee, or (3) he has been displaced as a result of disturbance in the country of his habitual residence: Sch 3 para 7(2). 'Country' includes a territory which has its own system of law: Sch 3 para 3(1). Where a country has more than one territory with its own system of law, a reference to the country, in relation to one of its nationals, is to the territory with which the national has the closer, or the closest, connection: Sch 3 para 3(2).

3 'Protective measure' means a measure directed to the protection of the person or property of an adult; and it may deal in particular with any of the following (1) the determination of incapacity and the institution of a protective regime, (2) placing the adult under the protection of an appropriate authority, (3) guardianship, curatorship or any corresponding system, (4) the designation and functions of a person having charge of the adult's person or property, or representing or otherwise helping him, (5) placing the adult in a place where protection can be provided, (6) administering, conserving or disposing of the adult's property, (7) authorising a specific intervention for the protection of the person or property of the adult: *ibid* Sch 3 para 5(1). Where a measure of like effect to a protective measure has been taken in relation to a person before he reaches 16, Sch 3 applies to the measure in so far as it has effect in relation to him once he has reached 16: Sch 3 para 5(2).

4 *Ibid* Sch 3 para 7(1).

5 *Ibid* Sch 3 para 8(1).

6 *Ie* the Convention on the International Protection of Adults (the Hague, 13 January 2000; Cm 5881) ('the Hague Convention') art 7.

7 2005 Act Sch 3 para 8(2).

8 Under the Hague Convention art 8.

9 2005 Act Sch 3 para 8(3).

10 A reference in ibid Sch 3 to the exercise of jurisdiction under Sch 3 is to the exercise of functions under the Mental Capacity Act 2005 as a result of Sch 3 Pt 2 (paras 7-10): Sch 3 para 10.

11 'Convention country' means a country in which the Hague Convention is in force: 2005 Act Sch 3 para 2(2).

12 Ibid Sch 3 para 9(1), (2). The Hague Convention art 12 also applies, so far as its provisions allow, in relation to the matter in so far as it involves the other country: 2005 Act Sch 3 para 9(3).

An expression which appears in Sch 3 and in the Hague Convention is to be construed in accordance with the Convention: 2005 Act Sch 3 para 2(4).

2. Applicable law

In exercising jurisdiction under Schedule 3 to the Mental Capacity Act 2005, the court may, if it thinks that the matter has a substantial connection with a country¹ other than England and Wales, apply the law of that other country². Where a protective measure³ is taken in one country but implemented in another, the conditions of implementation are governed by the law of the other country⁴.

If the donor of a lasting power⁵ is habitually resident in England and Wales at the time of granting the power, the law applicable to the existence, extent, modification or extinction of the power is (1) the law of England and Wales, or (2) if he specifies in writing the law of a connected country⁶ for the purpose, that law⁷. If he is habitually resident in another country at that time, but England and Wales is a connected country, the law applicable in that respect is (a) the law of the other country, or (b) if he specifies in writing the law of England and Wales for the purpose, that law⁸. The law applicable to the manner of the exercise of a lasting power is the law of the country where it is exercised⁹. Where a lasting power is not exercised in a manner sufficient to guarantee the protection of the person or property of the donor, the court, in exercising jurisdiction under Schedule 3 to the Mental Capacity Act 2005, may disapply or modify the power¹⁰. Where, in accordance with Part 3 of Schedule 3 to the Mental Capacity Act 2005, the law applicable to the power is, in one or more respects, that of a country other than England and Wales, the court must, so far as possible, have regard to the law of the other country in that respect (or those respects)¹¹.

The following provisions¹² apply where a person (a 'representative') in purported exercise of an authority to act on behalf of an adult¹³ enters into a transaction with a third party¹⁴. The validity of the transaction may not be questioned in proceedings, nor may the third party be held liable, merely because (i) where the representative and third party are in England and Wales when entering into the transaction, the law applicable to the authority in one or more respects is, as a result of Schedule 3 to the Mental Capacity Act 2005, the law of a country other than England and Wales, and the representative is not entitled to exercise the authority in that respect (or those respects) under the law of that other country¹⁵; (ii) where they are in another country at that time, the law applicable to the authority in one or more respects is, as a result of Part 3 of Schedule 3 to the Mental Capacity Act 2005, the law of England and Wales, and the representative is not entitled to exercise the authority in that respect (or those respects) under that law¹⁶.

Where the court is entitled to exercise jurisdiction under Schedule 3 to the Mental Capacity Act 2005, the mandatory provisions of the law of England and Wales apply, regardless of any system of law which would otherwise apply in relation to the matter¹⁷.

Nothing in Part 3 of Schedule 3 of the Mental Capacity Act 2005 requires or enables the application in England and Wales of a provision of the law of another country if its application would be manifestly contrary to public policy¹⁸.

1 For the meaning of 'country' see PARA 14A.1.

2 Mental Capacity Act 2005 Sch 3 para 11.

3 For the meaning of 'protective measure' see PARA 14A.1.

4 2005 Act Sch 3 para 12.

5 In *ibid* Sch 3 Pt 3 (paras 11-18), 'lasting power' means (1) a lasting power of attorney (see s 9), (2) an enduring power of attorney within the meaning of Sch 4, or (3) any other power of like effect: Sch 3 para 13(6). See further AGENCY vol 1 (2008) PARA 194 et seq.

Regulations may provide for Sch 1 (lasting powers of attorney: formalities) to apply with modifications in relation to a lasting power which comes within head (3): Sch 3 para 15.

6 A country is connected, in relation to the donor, if it is a country (1) of which he is a national, (2) in which he was habitually resident, or (3) in which he has property: *ibid* Sch 3 para 13(3). Where Sch 3 para 13 applies as a result of head (3), it applies only in relation to the property which the donor has in the connected country: Sch 3 para 13(4).

7 *Ibid* Sch 3 para 13(1).

8 *Ibid* Sch 3 para 13(2).

9 *Ibid* Sch 3 para 13(5).

10 *Ibid* Sch 3 para 14(1).

11 *Ibid* Sch 3 para 14(2).

12 *Ie* *ibid* Sch 3 para 16.

13 For the meaning of 'adult' see PARA 14A.1.

14 2005 Act Sch 3 para 16(1).

15 *Ibid* Sch 3 para 16(2)(a), (3). See further NOTE 16.

16 *Ibid* Sch 3 para 16(2)(b), (4).

Schedule 3 para 16 does not apply if the third party knew or ought to have known that the applicable law was (1) in a case within Sch 3 para 16(3), the law of the other country; (2) in a case within Sch 3 para 16(4), the law of England and Wales: Sch 3 para 16(5).

17 *Ibid* Sch 3 para 17.

18 *Ibid* Sch 3 para 18.

3. Recognition and enforcement

A protective measure¹ taken in relation to an adult² under the law of a country³ other than England and Wales is to be recognised in England and Wales if it was taken on the ground that the adult is habitually resident in the other country⁴. A protective measure taken in relation to an adult under the law of a Convention country⁵ other than England and Wales is to be recognised in England and Wales if it was taken on a ground mentioned in Chapter 2 of the Hague Convention (jurisdiction)⁶. But the court may disapply these provisions⁷ in relation to a measure if it thinks that (1) the case in which the measure was taken was not urgent, (2) the adult was not given an opportunity to be heard, and (3) that omission amounted to a breach of natural justice⁸. It may also disapply these provisions in relation to a measure if it thinks that (a) recognition of the measure would be manifestly contrary to public policy, (b) the measure would be inconsistent with a mandatory provision of the law of England and Wales, or (c) the measure is inconsistent with one subsequently taken, or recognised, in England and Wales in relation to the adult⁹. And the court may disapply these provisions in relation to a measure

taken under the law of a Convention country in a matter to which Article 33 of the Hague Convention applies, if the court thinks that that Article has not been complied with in connection with that matter¹⁰. An interested person may apply to the court for a declaration as to whether a protective measure taken under the law of a country other than England and Wales is to be recognised in England and Wales¹¹. For the purposes of the above provisions¹², any finding of fact relied on when the measure was taken is conclusive¹³.

An interested person may apply to the court for a declaration as to whether a protective measure taken under the law of, and enforceable in, a country other than England and Wales is enforceable, or to be registered, in England and Wales in accordance with Court of Protection Rules¹⁴.

Where (i) provision giving effect to, or otherwise deriving from, the Hague Convention in a country other than England and Wales applies in relation to a person who has not reached 16, and (ii) a measure is taken in relation to that person in reliance on that provision, Part 3 of Schedule 3 to the Mental Capacity Act 2005¹⁵ applies in relation to that measure as it applies in relation to a protective measure taken in relation to an adult under the law of a Convention country other than England and Wales¹⁶.

The court may not review the merits of a measure taken outside England and Wales except to establish whether the measure complies with Schedule 3 to the Mental Capacity Act 2005 in so far as it is, as a result of Schedule 3, required to do so¹⁷.

1 For the meaning of 'protective measure' see PARA 14A.1.

2 For the meaning of 'adult' see PARA 14A.1.

3 For the meaning of 'country' see PARA 14A.1.

4 Mental Capacity Act 2005 Sch 3 para 19(1).

5 For the meaning of 'Convention country' see PARA 14A.1.

6 2005 Act Sch 3 para 19(2). As to the Hague Convention see PARA 14A.1.

7 I.e the 2005 Act Sch 3 para 19.

8 Ibid Sch 3 para 19(3).

9 Ibid Sch 3 para 19(4).

10 Ibid Sch 3 para 19(5).

11 Ibid Sch 3 para 20(1). No permission is required for an application to the court under Sch 3 para 20: Sch 3 para 20(2). Court of Protection Rules may make provision about an application under Sch 3 para 20: Sch 3 para 25.

12 I.e ibid Sch 3 paras 19, 20.

13 Ibid Sch 3 para 21.

14 Ibid Sch 3 para 22(1). The court must make the declaration if (1) the measure comes within Sch 3 para 19(1) or (2), and (2) Sch 3 para 19 is not disapplied in relation to it as a result of Sch 3 para 19(3), (4) or (5): Sch 3 para 22(2). A measure to which a declaration under Sch 3 para 22 relates is enforceable in England and Wales as if it were a measure of like effect taken by the court: Sch 3 para 22(3). Court of Protection Rules may make provision about an application under Sch 3 para 22: Sch 3 para 25.

15 I.e ibid Sch 3 paras 11-18.

16 Ibid Sch 3 para 23.

17 Ibid Sch 3 para 24.

4. Co-operation

Where a public authority proposes to place an adult¹ in an establishment in a Convention country² other than England and Wales³, the public authority must consult an appropriate authority in that other country⁴ about the proposed placement and, for that purpose, must send it (1) a report on the adult, and (2) a statement of its reasons for the proposed placement⁵. If the appropriate authority in the other country opposes the proposed placement within a reasonable time, the public authority may not proceed with it⁶. A proposal received by a public authority under Article 33 of the Hague Convention in relation to an adult is to proceed unless the authority opposes it within a reasonable time⁷.

If a public authority is told that an adult (a) who is in serious danger, and (b) in relation to whom the public authority has taken, or is considering taking, protective measures⁸, is, or has become resident, in a Convention country other than England and Wales⁹, the public authority must tell an appropriate authority in that other country about (i) the danger, and (ii) the measures taken or under consideration¹⁰.

A public authority may not request from, or send to, an appropriate authority in a Convention country information in accordance with Chapter 5 of the Hague Convention (co-operation) in relation to an adult if it thinks that doing so (A) would be likely to endanger the adult or his property, or (B) would amount to a serious threat to the liberty or life of a member of the adult's family¹¹.

1 For the meaning of 'adult' see PARA 14A.1.

2 For the meaning of 'Convention country' see PARA 14A.1.

3 Mental Capacity Act 2005 Sch 3 para 26(1).

4 For the meaning of 'country' see PARA 14A.1.

5 2005 Act Sch 3 para 26(2).

6 Ibid Sch 3 para 26(3).

7 Ibid Sch 3 para 27. As to the Hague Convention see PARA 14A.1.

8 For the meaning of 'protective measure' see PARA 14A.1.

9 2005 Act Sch 3 para 28(1).

10 Ibid Sch 3 para 28(2).

11 Ibid Sch 3 para 29.

5. General

A certificate given under Article 38 of the Hague Convention¹ by an authority in a Convention country² other than England and Wales is, unless the contrary is shown, proof of the matters contained in it³.

Her Majesty may by Order in Council confer on the Lord Chancellor, the court or another public authority functions for enabling the Convention to be given effect in England and Wales⁴. Regulations may make provision (1) giving further effect to the Convention, or (2) otherwise about the private international law of England and Wales in relation to the protection of adults⁵. The regulations may (a) confer functions on the court or another public authority; (b) amend Schedule 3 to the Mental Capacity Act 2005; (c) provide for Schedule 3 to apply with specified modifications; (d) make provision about countries other than Convention countries⁶.

A reference in Schedule 3 to the Mental Capacity Act 2005 to regulations or an order (other than an Order in Council) is to regulations or an order made for the purposes of Sch 3 by the Lord Chancellor⁷.

Certain provisions of Schedule 3 to the Mental Capacity Act 2005 have effect only if the Convention is in force⁸.

Any function under the Convention of a Central Authority is exercisable in England and Wales by the Lord Chancellor⁹. A communication may be sent to the Central Authority in relation to England and Wales by sending it to the Lord Chancellor¹⁰.

1 As to the Hague Convention see PARA 14A.1.

2 For the meaning of 'Convention country' see PARA 14A.1.

3 Mental Capacity Act 2005 Sch 3 para 30.

4 Ibid Sch 3 para 31.

5 Ibid Sch 3 para 32(1). For the meaning of 'adult' see PARA 14A.1.

6 Ibid Sch 3 para 32(2).

Nothing in Sch 3 applies, and no provision made under Sch 3 para 32 is to apply, to any matter to which the Convention, as a result of art 4, does not apply: 2005 Act Sch 3 para 33.

7 Ibid Sch 3 para 34.

8 Is in force in accordance with the Hague Convention art 57: see 2005 Act Sch 3 para 35.

9 Ibid Sch 3 para 6(1).

10 Ibid Sch 3 para 6(2).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(3) LAW GOVERNING PROCEDURAL MATTERS/15. Evidence in general.

15. Evidence in general.

Questions of evidence are, in general, matters of procedure for the *lex fori*¹. Thus while the question of the facts to be proved in an action is substantive and is to be determined by the *lex causae*², the question of proof of those facts is determined by the *lex fori*³. A contract may be proved by any mode of proof recognised by the law of England or by any of the laws pursuant to which its formal validity may be established⁴.

1 *Yates v Thomson* (1835) 3 Cl & Fin 544, HL; *Bain v Whitehaven and Furness Junction Rly Co* (1850) 3 HL Cas 1; and see *Mahadervan v Mahadervan* [1964] P 233 at 243, [1962] 3 All ER 1108 at 1115, DC; *Dubai Bank v Galadari (No 5)* (1990) Times, 26 June. See also CIVIL PROCEDURE vol 11 (2009) PARA 755. As to the *lex fori* see para 11 ante.

2 *The Gaetano and Maria* (1882) 7 PD 137 especially at 149, CA. As to the *lex causae* see para 11 ante.

3 See paras 16-20 post. As to proof of foreign marriages, proof of foreign judgments, proof of foreign documents, and the taking of evidence for foreign courts, see generally CIVIL PROCEDURE. As to proof of foreign law see paras 28-29 post.

4 See the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L226, 9.10.80, p 1) art 9 (see para 363 post) and art 14 para 2 (see para 350 text and note 14 post). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(3) LAW GOVERNING PROCEDURAL MATTERS/16. Admissibility of evidence.

16. Admissibility of evidence.

Questions relating to the admissibility of evidence are governed by the *lex fori*¹. Thus a document which is inadmissible by the *lex causae*² for want of a stamp may nevertheless be admissible in England³, provided that, by the *lex causae*, the absence of the stamp does not render the document wholly null and void⁴; and a document which is admissible by the *lex causae* may nevertheless be inadmissible in England⁵.

The admissibility of extrinsic evidence adduced to interpret a document is a question of construction for the *lex causae*⁶; but the admissibility of extrinsic evidence to add to, vary or contradict its terms is, it seems, a question of evidence, governed by the *lex fori*⁷.

1 *Yates v Thomson* (1835) 3 Cl & Fin 544, HL; *Bain v Whitehaven and Furness Junction Rly Co* (1850) 3 HL Cas 1. See eg *Canada Trust Co v Stolzenberg (No 4)* (1998) Times, 14 May, CA. As to the *lex fori* see para 11 ante.

2 As to the *lex causae* see para 11 ante.

3 *Bristow v Sequeville* (1850) 5 Exch 275. See also *James v Catherwood* (1823) 3 Dow & Ry KB 190; *Wynne v Jackson* (1826) 2 Russ 351. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 *Alves v Hodgson* (1797) 7 Term Rep 241; *Clegg v Levy* (1812) 3 Camp 166; *Bristow v Sequeville* (1850) 5 Exch 275 at 279; but see *James v Catherwood* (1823) 3 Dow & Ry KB 190.

5 *Appleton v Lord Braybrook* (1817) 6 M & S 34; *Brown v Thornton* (1837) 6 Ad & El 185; *Finlay v Finlay and Rudall* (1862) 31 LJPM & A 149; cf *Abbott v Abbott and Godoy* (1860) 4 Sw & Tr 254.

6 *St Pierre v South American Stores (Gath and Chaves) Ltd* [1937] 1 All ER 206 at 209-210; affd [1937] 3 All ER 349, CA. In the case of a contract the *lex causae* will be the law identified by the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L226, 9.10.80, p 1): see art 10 para 1; and para 365 post.

7 *Korner v Witkowitz* [1950] 2 KB 128 at 162-163, [1950] 1 All ER 558 at 576, CA; on appeal sub nom *Vitkovice Horni a Hutni Tezirstvo v Korner* [1951] AC 869, [1951] 2 All ER 334, HL. Cf the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L226, 9.10.80, p 1) art 14 para 2 (see para 350 text and note 14 post).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(3) LAW GOVERNING PROCEDURAL MATTERS/17. Requirement of written evidence.

17. Requirement of written evidence.

The rule of English law that no action can be brought on a contract of guarantee unless the agreement or some note or memorandum of it is in writing¹ is a rule of procedure, and it may render a contract unenforceable in England even if it is valid by its proper law²; but if it may be proved under the foreign law which governs its formal validity without the need for writing, the lack of writing will be irrelevant³.

1 See the Statute of Frauds (1677) s 4 (amended by the Law Reform (Enforcement of Contracts) Act 1954 s 1); and see CONTRACT vol 9(1) (Reissue) para 623. The analogous rule concerning contracts for the disposition of an interest in land (ie the Law of Property Act 1925 s 40(1) (repealed)) has been replaced by the Law of Property (Miscellaneous Provisions) Act 1989 s 2, by virtue of which a contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms of the agreement in one document or, where the contracts are exchanged, in each document. See also SALE OF LAND vol 42 (Reissue) para 29. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Leroux v Brown* (1852) 12 CB 801; cf *Acebal v Levy* (1834) 10 Bing 376. *Leroux v Brown* supra has been approved in *Jones v Victoria Graving Dock Co* (1877) 2 QBD 314 at 323, CA; *Britain v Rossiter* (1879) 11 QBD 123 at 128, CA; *Maddison v Alderson* (1883) 8 App Cas 467 at 474, 488, HL; *Rochefoucauld v Boustead* [1897] 1 Ch 196 at 207, CA; *Morris v Baron & Co* [1918] AC 1 at 15-16, HL; cf *G & H Montage GmbH v Irvani* [1990] 2 All ER 225, [1990] 1 WLR 667, CA. But it was doubted in *Williams v Wheeler* (1860) 8 CBNS 299 at 316; *Gibson v Holland* (1865) LR 1 CP 1 at 8; *Rawley v Rawley* (1876) 1 QBD 460 at 461, CA. See also *Re De Nicols, De Nicols v Curlier* [1900] 2 Ch 410; and para 420 note 3 post. For the meaning of 'the proper law (of a contract)' see para 349 note 7 post.

3 See the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L226, 9.10.80, p 1) art 9 (see para 363 post) and art 14 para 2 (see para 350 text and note 14 post).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1.
INTRODUCTION/(3) LAW GOVERNING PROCEDURAL MATTERS/18. Witnesses.

18. Witnesses.

Questions such as whether a witness is competent¹ or whether he can claim privilege² are matters for the lex fori³.

1 *Bain v Whitehaven and Furness Junction Rly Co* (1850) 3 HL Cas 1 at 19.

2 *United States of America v McRae* (1867) 3 Ch App 79.

3 As to the lex fori see para 11 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1.
INTRODUCTION/(3) LAW GOVERNING PROCEDURAL MATTERS/19. Burden of proof.

19. Burden of proof.

Questions relating to the burden of proof, including the standard of proof ¹, are questions of evidence for the lex fori².

1 *Wiedemann v Walpole* [1891] 2 QB 534, CA (corroboration).

2 *The Roberta* (1937) 58 Ll L Rep 159 at 177; *Re Fuld's Estate (No 3)*, *Hartley v Fuld* [1968] P 675 at 696-698, [1965] 3 All ER 776 at 780-781; and see CIVIL PROCEDURE vol 11 (2009) PARAS 769-775. As to the exception which applies in relation to contracts see the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L226, 9.10.80, p 1) art 14 para 1; and para 350 note 14 post. As to the lex fori see para 11 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(3) LAW GOVERNING PROCEDURAL MATTERS/20. Presumptions.

20. Presumptions.

Irrebuttable presumptions of law, such as the English presumption of survivorship¹, are matters of substance for the *lex causae*². It is uncertain whether rebuttable presumptions of law, such as the English presumption of marriage³, are matters of substance, and so governed by the *lex causae*, or matters of procedure, and so governed by the *lex fori*⁴. Nor is it certain whether the operation of an estoppel is a matter of evidence for the *lex fori* or a matter governed by the *lex causae*⁵.

1 See the Law of Property Act 1925 s 184; and see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 146. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Re Cohn* [1945] Ch 5. As to the distinction between rebuttable and irrebuttable presumptions of law see CIVIL PROCEDURE vol 11 (2009) PARA 1097 et seq. As to the *lex causae* see para 11 ante.

3 *Piers v Piers* (1849) 2 HL Cas 331; *Re Shephard, George v Thyer* [1904] 1 Ch 456; and see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 6-7.

4 *Hill v Hibbit* (1870) 25 LT 183; *De Thoren v A-G* (1876) 1 App Cas 686, HL; *Re Shephard, George v Thyer* [1904] 1 Ch 456; *Mahadervan v Mahadervan* [1964] P 233 at 242-243, [1962] 3 All ER 1108 at 1115, DC; *Radwan v Radwan (No 2)* [1973] Fam 35 at 42-43, [1972] 3 All ER 1026 at 1030. As to the *lex fori* see para 11 ante.

5 *Low v Bouverie* [1891] 3 Ch 82 at 105, CA; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 919, [1966] 2 All ER 536 at 554, HL, per Lord Reid; *Vervaeke (formerly Messina) v Smith* [1983] 1 AC 145 at 162, [1982] 2 All ER 144 at 156, HL, per Lord Simon of Glaisdale; *Janred Properties Ltd v Ente Nazionale Italiano per il Turismo* [1989] 2 All ER 444, CA.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(3) LAW GOVERNING PROCEDURAL MATTERS/21. Nature of remedy.

21. Nature of remedy.

All matters relating to the nature of the claimant's remedy, such as whether the claimant is entitled to an injunction or to an order for specific performance or for an account of profits, are for the *lex fori*¹. A claimant bringing an action in England to enforce a foreign right will not be defeated merely because English remedies are greater or less than, or otherwise different from, those in the foreign country²; but his action will fail if the machinery by way of remedies in England is so different from that in the foreign country as to make the right sought to be enforced an essentially different right³.

In relation to a contract to which the Rome Convention⁴ applies, the consequences of breach (which will include the remedies available) are governed by the law which governs the contract⁵. In relation to a tort to which the Private International Law (Miscellaneous Provisions) Act 1995 applies⁶, questions of procedure in any proceedings are determined in accordance with the *lex fori*⁷.

1 *Liverpool Marine Credit Co v Hunter* (1868) 3 Ch App 479 at 486; *Baschet v London Illustrated Standard Co* [1900] 1 Ch 73; *Chaplin v Boys* [1971] AC 356 at 394, [1969] 2 All ER 1085 at 1106, HL, per Lord Pearson. As to injunctions generally see CIVIL PROCEDURE vol 11 (2009) PARA 331 et seq. As to specific performance generally see SPECIFIC PERFORMANCE. As to the *lex fori* see para 11 ante.

2 *Phrantzes v Argenti* [1960] 2 QB 19 at 35, [1960] 1 All ER 778 at 784. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 *Phrantzes v Argenti* [1960] 2 QB 19 at 35-36, [1960] 1 All ER 778 at 784; cf *Shahnaz v Rizwan* [1965] 1 QB 390, [1964] 2 All ER 993.

4 I.e. the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L226, 9.10.80, p 1). As to the contracts to which the Convention applies see para 350 post.

5 See the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L226, 9.10.80, p 1) art 10 para 1; and para 365 post.

6 As to the scope of the Private International Law (Miscellaneous Provisions) Act 1995 see para 368 post.

7 *Ibid* s 14(3)(b). For these purposes, questions of procedure include quantum (in relation to the calculation of the measure of damages but not in relation to heads of damage or to liability, which are substantive issues): see paras 22, 371 note 5 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(3) LAW GOVERNING PROCEDURAL MATTERS/22. Damages.

22. Damages.

The assessment of damages for breach of a contract to which the Rome Convention¹ applies is a matter for the law which governs the contract², and there is no separate role for the *lex fori*³.

Otherwise there remains a distinction between remoteness of damage, which is a question of substance governed by the *lex causae*⁴, and the measure or quantification of damages, which is a question of procedure governed by the *lex fori*⁵. Remoteness of damage includes such questions as whether the claimant can recover only for reasonably foreseeable kinds of loss⁶, or for particular heads of damage, such as damages for pain and suffering⁷. The measure or quantification of damages includes such matters as the determination of the money value to be put on any particular item of loss for which the defendant is liable⁸, and the manner in which provision is made for future or prospective losses⁹.

Damages may be awarded in sterling or in a foreign currency¹⁰. The latter course may be followed if the foreign currency is that in which the loss was felt or borne by the claimant¹¹. Such an order has been made in the case of a liquidated debt expressed in a foreign currency¹², damages for breach of contract¹³, damages for tort¹⁴, and for restitution upon the frustration of a contract¹⁵. If the latter is ordered, the sum will be converted into sterling at the date upon which the court authorises enforcement¹⁶, unless statute provides otherwise.

The liability to pay interest and the rate of interest payable upon a contractual debt are matters of substance and are governed by the law which governs the contract¹⁷. The interest rate should be that which applies to the currency in question¹⁸.

1 The Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L226, 9.10.80, p 1). As to the contracts to which the Convention applies see para 350 post.

2 As to the applicable law see *ibid* arts 3-6 (see paras 351-354 post) and art 12 (see para 411 post).

3 See the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L226, 9.10.80, p 1) art 10; and para 365 post.

4 As to the *lex causae* see para 11 ante.

5 *J D'Almeida Araujo Lda v Sir Frederick Becker & Co Ltd* [1953] 2 QB 329 at 333-338, [1953] 2 All ER 288 at 290-293; *Coupland v Arabian Gulf Petroleum Co* [1983] 2 All ER 434, [1983] 1 WLR 1136. As to the characterisation of issues relating to damages in tort see para 371 note 5 post. As to the *lex fori* see para 11 ante.

6 *J D'Almeida Araujo Lda v Sir Frederick Becker & Co Ltd* [1953] 2 QB 329, [1953] 2 All ER 288.

7 *Chaplin v Boys* [1971] AC 356 at 379, [1969] 2 All ER 1085 at 1093, HL, per Lord Hodson, at 392-393 and 1104-1105 per Lord Wilberforce, and at 395 and 1106 per Lord Pearson; contra at 382-383 and 1095-1096 per Lord Guest; and see, in the court below, sub nom *Boys v Chaplin* [1968] 2 QB 1 at 20, 41, [1968] 1 All ER 283 at 286-287, 299, CA; contra at 32 and 294. See also *Kendrick v Burnett* (1897) 25 R 82, Ct of Sess; *Naftalin v London, Midland and Scottish Rly Co* 1933 SC 259; *M'Elroy v M'Allister* 1949 SC 110; *MacKinnon v Iberia Shipping Co Ltd* 1955 SC 20.

8 *Kohnke v Karger* [1951] 2 KB 670, [1951] 2 All ER 179; *Chaplin v Boys* [1971] AC 356 at 379, [1969] 2 All ER 1085 at 1093, HL, per Lord Hodson, at 381-382 and 1094-1096 per Lord Guest, and at 392-394 and 1104-1106 per Lord Wilberforce. See para 371 note 5 post.

9 *Kohnke v Karger* [1951] 2 KB 670, [1951] 2 All ER 179; *Chaplin v Boys* [1971] AC 356 at 393-394, [1969] 2 All ER 1085 at 1105-1106, HL, per Lord Wilberforce. As to circumstances in which these damages may be awarded see the Supreme Court Act 1981 s 32A (added by the Administration of Justice Act 1982 s 6).

- 10 *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, [1975] 3 All ER 801, HL.
- 11 *MV Eleftherotria (Owners) v MV Despina R (Owners), The Despina R, Services Europe Atlantique Sud (SEAS) v Stockholms Rederiaktiebolag SVEA, The Falias* [1979] AC 685, [1979] 1 All ER 421, HL.
- 12 *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, [1975] 3 All ER 801, HL.
- 13 *MV Eleftherotria (Owners) v MV Despina R (Owners), The Despina R, Services Europe Atlantique Sud (SEAS) v Stockholms Rederiaktiebolag SVEA, The Falias* [1979] AC 685, [1979] 1 All ER 421, HL (so far as it relates to the Despina R).
- 14 *MV Eleftherotria (Owners) v MV Despina R (Owners), The Despina R, Services Europe Atlantique Sud v Stockholms Rederiaktiebolag Svea, The Falias* [1979] AC 685, [1979] 1 All ER 421, HL (so far as it relates to the Falias).
- 15 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 970, [1979] 1 WLR 783 at 840; affd [1982] 1 All ER 925 at 978, [1981] 1 WLR 232, CA; affd [1983] 2 AC 352, [1982] 1 All ER 925, 986, HL.
- 16 *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at 463, 468-469, 497-498, 501, [1975] 3 All ER 801 at 809, 813-814, 838, 841, HL; *Re Lines Bros Ltd* [1983] Ch 1, [1982] 2 All ER 183, CA.
- 17 As to which see the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L226, 9.10.80, p 1) art 10(1)(b); and para 365 post.
- 18 *Shell Tankers (UK) Ltd v Astro Comino Armadora SA, The Pacific Colocotronis* [1981] 2 Lloyd's Rep 40, CA. The judgment will itself carry interest at the English rate: *Practice Direction* [1976] 1 All ER 669, [1976] 1 WLR 83. However, where a judgment is given for a sum expressed in a currency other than sterling, the court may order that the interest rate applicable to the judgment debt is to be such a rate as the court thinks fit: Administration of Justice Act 1970 s 44A(1) (added by the Private International Law (Miscellaneous Provisions) Act 1995 s 1(1)).

UPDATE

22 Damages

NOTE 9--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

NOTE 17--See *Maher v Groupama Grand Est* [2009] EWHC 38 (QB), [2009] 1 All ER 1116.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1.
INTRODUCTION/(3) LAW GOVERNING PROCEDURAL MATTERS/23. Set-off and counterclaim.

23. Set-off and counterclaim.

Whether the defendant's counterclaim¹ may be tried together with the claim is a matter of procedure to be determined by the *lex fori*². The question whether a counterclaim may be made in an action is for the *lex fori*³. But the question whether a set-off has the effect of discharging or extinguishing the claimant's claim (in whole or in part) is one of substance, and is governed by the *lex causae*⁴.

1 le the defendant's claim against a claimant which he seeks to set off against the claimant's claim against him.

2 *Meyer v Dresser* (1864) 16 CBNS 646; *Maspons y Hermano v Mildred* (1882) 9 QBD 530, CA. As to the *lex fori* see para 11 ante.

3 *South African Republic v La Compagnie Franco-Belge du Chemin de Fer du Nord* [1897] 2 Ch 487, CA.

4 *MacFarlane v Norris* (1862) 2 B & S 783; *Rouquette v Overmann and Schou* (1875) LR 10 QB 525 at 540-541, explaining *Allen v Kemble* (1848) 6 Moo PCC 314. See generally CIVIL PROCEDURE vol 11 (2009) para 634 et seq. As to the *lex causae* see para 11 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(3) LAW GOVERNING PROCEDURAL MATTERS/24. Priorities.

24. Priorities.

Questions of priorities among claimants upon a limited fund, such as creditors in a bankruptcy, winding up or administration¹, are procedural and are determined by the *lex fori*², which also governs the priority of claims against a ship in admiralty proceedings³.

Not all questions of priorities are governed by the *lex fori*. Thus the priority of competing assignments of a debt is probably governed by the law governing the contract to which the assignment relates⁴; and it seems that the priority of claims against immovables is governed by the *lex situs*, namely the law of the place where they are situated⁵.

1 *Pardo v Bingham* (1868) LR 6 Eq 485; *Re Melbourn, ex p Melbourn* (1870) 6 Ch App 64; *Re Kloebe, Kannreuther v Geiselbrecht* (1884) 28 ChD 175, reviewing *Cook v Gregson* (1854) 2 Drew 286; and see para 502 post.

2 As to the *lex fori* see para 11 ante.

3 *Bankers Trust International Ltd v Todd Shipyards Corpn, The Halcyon Isle* [1981] AC 221, [1980] 3 All ER 197, PC. See also *The Jonathan Goodhue* (1859) Sw 524; *The Tagus* [1903] P 44; *The Colorado* [1923] P 102, CA; *The Zigurds* [1932] P 113 (revsd on another point [1933] P 87, CA; affd sub nom *Smith v Zigurds (Owners)* [1934] AC 209, HL). It may be that there had been a failure here to distinguish between the *lex fori* and the *lex loci*. As to the priority of such claims generally see SHIPPING AND MARITIME LAW.

4 See para 411 post.

5 *Norton v Florence Land and Public Works Co* (1877) 7 ChD 332.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(3) LAW GOVERNING PROCEDURAL MATTERS/25. Gaming and wagering contracts.

25. Gaming and wagering contracts.

In so far as the Gaming Act 1845 enacts that no suit is to be brought or maintained to recover any sum of money or valuable thing alleged to have been won upon any wager¹, it is a statute affecting procedure, and therefore no action lies in England for money won upon a wager in a foreign country, even though the wager is lawful by its proper law².

¹ See the Gaming Act 1845 s 18 (as amended). Cf the Gaming Act 1892 s 1; and LICENSING AND GAMBLING vol 67 (2008) PARA 327.

² *Moulis v Owen* [1907] 1 KB 746 at 753, CA; *Hill v William Hill (Park Lane) Ltd* [1949] AC 530 at 579, [1949] 2 All ER 452 at 481-482, HL. This principle is unaffected by the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L226, 9.10.80, p 1), which does not apply to matters of procedure: see art 1 para 2(h); and para 350 text and note 14 post. For the meaning of 'the proper law (of a contract)' see para 349 note 7 post. As to the enforceability generally of loans made abroad for the purpose of betting or gaming see *Saxby v Fulton* [1909] 2 KB 208, CA. See also LICENSING AND GAMBLING. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

UPDATE

25 Gaming and wagering contracts

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

TEXT AND NOTE 1--Gaming Acts 1845 repealed: Gambling Act 2005 Sch 17. As to enforceability of gambling contracts see now s 335; and LICENSING AND GAMBLING vol 67 (2008) PARA 327.

NOTE 1--Gaming Acts 1892 repealed: 2005 Act Sch 17.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1.
INTRODUCTION/(3) LAW GOVERNING PROCEDURAL MATTERS/26. Limitation of actions.

26. Limitation of actions.

Generally¹, where in any action or proceedings in a court in England the law² of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter: (1) the law of that other country relating to limitation applies in respect of that matter for the purposes of the action or proceedings³; and (2) unless both the law of England and the law of some other country fall to be taken into account in the matter being determined⁴, the law of England relating to limitation does not so apply⁵.

In any case, however, in which the provisions described above would conflict⁶ to any extent with public policy, they do not apply to the extent that such conflict would result⁷; the application of those provisions in relation to any action or proceedings conflicts with public policy to the extent that their application would cause undue hardship to a person who is, or might be, a party to the action or proceedings⁸. Where, under a foreign limitation law which is applicable⁹ for the purposes of any action or proceedings, a limitation period is or may be extended or interrupted in respect of the absence of a party to the action or proceedings from any specified jurisdiction or country, so much of that law as provides for the extension or interruption must be disregarded for those purposes¹⁰.

Where a court in any country outside England has determined any matter wholly or partly by reference to the law of that or any other country (including England) relating to limitation¹¹, then, for the purposes of the law relating to the effect to be given in England to that determination, that court must, to the extent that it has so determined the matter, be deemed to have determined it on its merits¹².

The provisions described above apply to any action or proceedings by or against the Crown¹³ as they apply to actions and proceedings to which the Crown is not a party¹⁴.

1 As to the exceptions see the text and notes 6-14 infra.

2 'Law' in relation to any country does not include rules of private international law applicable to the courts of that country or, in the case of England, the Foreign Limitation Periods Act 1984: s 1(5). As to the background to the Act see *Classification of Limitation in Private International Law* (Law Com no 114) (1982). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 Foreign Limitation Periods Act 1984 s 1(1)(a). As to the law relating to limitation see note 11 infra. The law of England determines for the purposes of any law applicable under s 1(1)(a) (ie head (1) in the text) whether, and the time at which, proceedings have been commenced in respect of any matter: s 1(3). The Limitation Act 1980 s 35 (see LIMITATION PERIODS vol 68 (2008) PARA 1235) applies to time limits applicable under the Foreign Limitation Periods Act 1984 s 1(1)(a): s 1(3). A court in England, in exercising under s 1(1)(a) any discretion conferred by the law of any other country, must so far as practicable exercise that discretion in the manner in which it is exercised in comparable cases by the courts of that other country: s 1(4). As to the application of the Foreign Limitation Periods Act 1984 to arbitration see LIMITATION PERIODS vol 68 (2008) PARA 917.

4 Ibid s 1(2).

5 Ibid s 1(1)(b).

6 Ie under ibid s 2(2) or otherwise.

7 Ibid s 2(1).

8 Ibid s 2(2). See *Jones v Trollope Colls Cementation Overseas Ltd* (1990) Times, 26 January, CA; *Hellenic Steel Co v Volamar Shipping Co Ltd, The Komninos S* [1990] 1 Lloyd's Rep 541, DC; and cf *Arab Monetary Fund*

v Hashim [1993] 1 Lloyd's Rep 543 at 592-593. In such a case it is likely that the limitation period fixed by English law applies instead.

9 Ie under the Foreign Limitation Periods Act 1984 s 1(1)(a): see head (1) in the text.

10 Ibid s 2(3).

11 Subject to *ibid* s 4(3) (see *infra*), references to the law of any country (including England) relating to limitation are to be construed as references to so much of the relevant law of that country as makes provision with respect to a limitation period applicable to the bringing of proceedings in respect of that matter in the courts of that country and include: (1) references to so much of that law as relates to, and to the effect of, the application, extension, reduction or interruption of that period; and (2) a reference, where under that law there is no limitation period which is so applicable, to the rule that such proceedings may be brought within an indefinite period: s 4(1). 'Relevant law' in relation to any country means the procedural and substantive law applicable, apart from any rules of private international law, by the courts of that country: s 4(2).

References to the law of England relating to limitation do not include the rules by virtue of which a court may, in the exercise of any discretion, refuse equitable relief on the grounds of acquiescence or otherwise: s 4(3). However, in applying those rules to a case in relation to which the law of any country outside England is applicable by virtue of s 1(1)(a) (see head (1) in the text) (not being a law that provides for a limitation period that has expired), a court in England must have regard, in particular, to the provisions of the law that is so applicable: s 4(3).

12 Ibid s 3.

13 This includes any action or proceedings by or against: (1) Her Majesty in right of the Duchy of Lancaster; (2) any government department or any officer of the Crown as such or any person acting on behalf of the Crown; and (3) the Duke of Cornwall: *ibid* s 6(2).

14 Ibid s 6(1). As to actions or proceedings by or against the Crown see CROWN PROCEEDINGS AND CROWN PRACTICE; LIMITATION PERIODS vol 68 (2008) PARA 903.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1.
INTRODUCTION/(3) LAW GOVERNING PROCEDURAL MATTERS/27. Method of enforcement.

27. Method of enforcement.

All matters relating to process generally are determined by the *lex fori*¹. This law, therefore, governs such questions as whether a judgment debtor can be arrested for non-payment of the debt², or whether a writ *ne exeat regno* can be granted against a defendant³.

1 *Flack v Holm* (1820) 1 Jac & W 405; *De la Vega v Vianna* (1830) 1 B & Ad 284; *Liverpool Marine Credit Co v Hunter* (1868) 3 Ch App 479 at 486. As to the *lex fori* see para 11 ante.

2 *De la Vega v Vianna* (1830) 1 B & Ad 284. Cf *Talleyrand v Boulanger* (1797) 3 Ves 447, as explained in *Liverpool Marine Credit Co v Hunter* (1868) 3 Ch App 479 at 486; *Brettillot v Sandos* (1837) 4 Scott 201.

3 *Flack v Holm* (1820) 1 Jac & W 405; *Grant v Grant* (1827) 3 Russ 598.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(4) PROOF OF FOREIGN LAW/28. Need for proof.

(4) PROOF OF FOREIGN LAW

28. Need for proof.

Generally¹, foreign law is a question of fact² which must be specifically pleaded by the party relying upon it³, and must be proved to the court⁴. In the absence of satisfactory proof, the court will apply English law⁵. Thus the onus of proof of foreign law lies on the party relying on it⁶. Where, for the purpose of disposing of any action or other matter which is being tried by a judge with a jury in any court in England, it is necessary to ascertain the law of any other country which is applicable to the facts of the case, any question as to the effect of the evidence given with respect to that law must, instead of being submitted to the jury, be decided by the judge alone⁷.

This rule does not apply in the case of an appellate court which has jurisdiction to hear appeals from several countries. Thus the House of Lords⁸ takes judicial notice of the law of Scotland and Northern Ireland so far as it is material to the issues raised by the record in all cases that come before it⁹; and, similarly, the Judicial Committee of the Privy Council takes judicial notice of the law of the particular country from which appeal is made to it¹⁰.

A statutory exception to the rule is provided by the British Law Ascertainment Act 1859, by which a court in any part of Her Majesty's dominions may, if of the opinion that it is necessary or expedient for the proper disposal of any action, state a case for the opinion of a superior court in any other part of Her Majesty's dominions¹¹ upon the law applicable to the facts stated in the case¹².

The European Convention on Information on Foreign Law¹³ permits the judicial authority of a contracting state to make a request for information¹⁴.

1 See the text and notes 8-14 infra.

2 *Mostyn v Fabrigas* (1774) 1 Cowp 161 at 174; *Guaranty Trust Co of New York v Hannay & Co* [1918] 2 KB 623 at 667, CA; *Bankers and Shippers Insurance Co of New York v Liverpool Marine and General Insurance Co Ltd* (1925) 24 Ll L Rep 85 at 88, HL; *Ottoman Bank of Nicosia v Chakarian* [1938] AC 260 at 279, [1937] 4 All ER 570 at 581, PC; *Glencore International AG v Metro Trading Inc* [2001] 1 Lloyd's Rep 284. However, the question of foreign law is a question of fact of a peculiar kind and the same considerations do not apply in considering whether and to what extent an appellate court should interfere with the finding of a lower court, as in the case of the ordinary questions of fact: *Parkasho v Singh* [1968] P 233 at 250-254, [1967] 1 All ER 737 at 746-749, DC; *Macmillan Inc v Bishopsgate Investment Trust plc (No 4)* (1998) Times, 7 December, CA.

3 *Ascherberg, Hopwood and Crew Ltd v Casa Musicale Sonzogno (Di Piero, Ostale Societa in Nome Collettivo)* [1971] 3 All ER 38, [1971] 1 WLR 1128, CA. An English court will not apply a foreign law of its own motion: see eg *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 2 All ER 552, [1976] 1 WLR 676. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 *Fremoult v Dedire* (1718) 1 P Wms 429; *Mostyn v Fabrigas* (1774) 1 Cowp 161; *Earl Nelson v Lord Bridport* (1845) 8 Beav 527; *Lloyd v Guibert* (1865) LR 1 QB 115 at 129. Although an English court does not generally take judicial notice of foreign law, there are exceptions to this rule: see the cases cited infra; the text and notes 8-14 infra; and Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 222-223.

Foreign law need not be proved if it is admitted: see eg *Moulis v Owen* [1907] 1 KB 746, CA. The court can, in exceptional circumstances and with the consent of the parties, decide a question of foreign law without proof: *Beatty v Beatty* [1924] 1 KB 807 at 814-815, CA; *Jabbour v Custodian of Israeli Absentee Property* [1954] 1 All ER 145 at 153, [1954] 1 WLR 139 at 147-148. Evidence may also be given as to how a discretion in the foreign law would be exercised: *National Mutual Holdings Pty Ltd v Sentry Corpn* (1989) 87 ALR 539.

5 *Bumper Development Corp v Metropolitan Police Comr* [1991] 4 All ER 638, [1991] 1 WLR 1362, CA. The basis upon which the court applies English law in these circumstances is not clear, however. It may be either that the court makes an original presumption that English law applies (and a lack of sufficient proof fails to dislodge this presumption) or the court presumes that foreign law is the same as English law unless the contrary is proved. The latter view has received most frequent judicial expression: see eg *The Parchim* [1918] AC 157 at 161, PC; *Dynamit AG v Rio Tinto Co* [1918] AC 292 at 295, HL; *The Colorado* [1923] P 102 at 111, CA; *Sedgwick Collins & Co Ltd v Highton* (1929) 34 Ll L Rep 448 at 457; *The Torni* [1932] P 78 at 91, CA; *Hartmann v Konig* (1933) 50 TLR 114 at 117, HL; *Casey v Casey* [1949] P 420 at 430, [1949] 2 All ER 110 at 116, CA; *Royal Boskalis Westminster NV v Mountain* [1999] QB 674, [1997] 2 All ER 929, CA. However, see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 232, where it is suggested that the terminology of presumption as to the similarity between English and foreign law is abandoned due to the difficulties it can cause.

6 *Brown v Gracey* (1821) 1 Dow & Ry NP 41; *Smith v Gould* (1842) 4 Moo PCC 21; *Nouvelle Banque de l'Union v Ayton* (1891) 7 TLR 377, CA; *Dynamit AG v Rio Tinto Co* [1918] AC 292, HL; *Guaranty Trust Co of New York v Hannay & Co* [1918] 2 KB 623, CA.

7 Administration of Justice Act 1920 s 15; Supreme Court Act 1981 s 69(5); County Courts Act 1984 s 68. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

8 *Cooper v Cooper* (1888) 13 App Cas 88 at 104, HL, per Lord Watson. As to the jurisdiction of the House of Lords see COURTS vol 10 (Reissue) para 360 et seq.

9 *Douglas v Brown* (1831) 2 Dow & Cl 171, HL; *De Thoren v A-G* (1876) 1 App Cas 686, HL; *Cooper v Cooper* (1888) 13 App Cas 88, HL; *Lyell v Kennedy* (1889) 14 App Cas 437, HL; *Elliot v Joicey* [1935] AC 209 at 213, 236, HL; *Rockware Glass Ltd v MacShannon* [1978] AC 795, [1978] 1 All ER 625, HL.

10 *Sumboochunder Chowdry v Naraini Dibeh and Ramkishor* (1835) 3 Knapp 55, PC; *Cameron v Kyte* (1835) 3 Knapp 332, PC.

11 The British Law Ascertainment Act 1859 also applies to certain Commonwealth countries which are no longer part of Her Majesty's dominions: see CIVIL PROCEDURE vol 11 (2009) PARAS 1092-1093. As to the Commonwealth and Her Majesty's dominions see COMMONWEALTH vol 13 (2009) PARAS 701, 707.

12 Ibid s 1; *Topham v Duke of Portland* (1863) 1 De GJ & Sm 517; *Eglinton v Lamb* (1867) 15 LT 657; *Phosphate Sewage Co v Molleson* (1876) 1 App Cas 780 at 787, HL.

13 Ie the European Convention on Information on Foreign Law (TS 117 (1969); Cmnd 4229). The contracting states are the members of the Council of Europe.

14 See ibid art 3 para 1. The request must be for information as to law and procedure in civil and commercial matters or in incidental questions arising from the questions raised in connection with those matters: arts 1(1), 4(3). The information given in reply does not bind the judicial authority which made the request: art 8.

UPDATE

28 Need for proof

NOTE 7--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(4) PROOF OF FOREIGN LAW/29. Mode of proof.

29. Mode of proof.

The English¹ court will not, in general, make its own researches into foreign law². Foreign law must be proved by properly qualified witnesses³. In civil proceedings a person who is suitably qualified to do so on account of his knowledge or experience is competent to give expert evidence as to the law of any country or territory outside the United Kingdom, or of any part of the United Kingdom other than England, irrespective of whether he has acted or is entitled to act as a legal practitioner there⁴. If his evidence is uncontradicted, the court will normally accept it⁵, unless it is obviously unreliable or extravagant⁶. Where the witness puts in materials as part of his evidence, the court is entitled to examine those materials⁷, and where there is a conflict of evidence as to the interpretation to be placed upon the materials, the court is entitled and bound to scrutinise them and form its own independent conclusion on them⁸.

Because foreign law is a question of fact, previous English decisions on foreign law do not act as precedents at common law⁹. However, this rule has been altered by statute in the case of civil proceedings¹⁰, so that previous findings or decisions of certain courts¹¹ which are reported or recorded in citable form¹², whether in civil or criminal proceedings, can be adduced in evidence in civil proceedings¹³. If such findings or decisions are so adduced, the law of the country, territory or part with respect to that matter must be taken to be in accordance with them unless the contrary is proved¹⁴, except where they conflict on the point¹⁵.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Di Sora v Philipps* (1863) 10 HL Cas 624 at 640; *Bumper Development Corp v Metropolitan Police Comr* [1991] 4 All ER 638, [1991] 1 WLR 1362, CA. As to the exceptions to this rule see para 28 ante. As to proof of colonial and other statutes see the Evidence (Colonial Statutes) Act 1907. See also CIVIL PROCEDURE vol 11 (2009) PARA 1092.

3 *Sussex Peerage Case* (1844) 11 Cl & Fin 85 at 115, HL; *Baron de Bode's Case* (1845) 8 QB 208 at 246-247; *Earl Nelson v Lord Bridport* (1845) 8 Beav 527 at 536; *Castrique v Imrie* (1870) LR 4 HL 414 at 430; *Bumper Development Corp v Metropolitan Police Comr* [1991] 4 All ER 638, [1991] 1 WLR 1362, CA; *Glencore International AG v Metro Trading Inc* [2001] 1 Lloyd's Rep 284. As to the competency of witnesses see CIVIL PROCEDURE vol 11 (2009) PARA 966 et seq.

4 Civil Evidence Act 1972 s 4(1); *Practice Direction* [1972] 3 All ER 912, [1972] 1 WLR 1433; *Associated Shipping Services Ltd v Department of Private Affairs of HH Sheikh Zayed Bin Sultan Al-Nahayan* (1990) Financial Times, 31 July. See also CIVIL PROCEDURE vol 11 (2009) PARA 1088. For the meaning of 'United Kingdom' see para 4 ante.

5 *Buerger v New York Life Assurance Co* (1927) 96 LJB 930 at 940, CA; *F Koechlin & Cie v Kestenbaum Bros* [1927] 1 KB 616 at 622 (on appeal [1927] 1 KB 889 at 895, CA); *Re Banque des Marchands & Moscou (Koupetschesky)* [1958] Ch 182, [1957] 3 All ER 182; *Rossano v Manufacturers' Life Insurance Co Ltd* [1963] 2 QB 352 at 381, [1962] 2 All ER 214 at 231; *Sharif v Azad* [1967] 1 QB 605 at 616, [1966] 3 All ER 785 at 788; and see CIVIL PROCEDURE vol 11 (2009) PARA 1090.

6 *Buerger v New York Life Assurance Co* (1927) 96 LJB 930 at 941, CA; *AS Tallinna Laevauhisus v Estonian State Steamship Line* (1947) 80 Ll L Rep 99 at 108; *Re Valentine's Settlement, Valentine v Valentine* [1965] Ch 831 at 855, [1965] 2 All ER 226 at 238, CA; *Associated Shipping Services Ltd v Department of Private Affairs of HH Sheikh Zayed Bin Sultan Al-Nahayan* (1990) Financial Times, 31 July.

7 *Earl Nelson v Lord Bridport* (1845) 8 Beav 527 at 541; *Concha v Murrietta, De Mora v Concha* (1889) 40 ChD 543, CA; *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289 at 298, HL; *Bumper Development Corp v Metropolitan Police Comr* [1991] 4 All ER 638, [1991] 1 WLR 1362, CA. See CIVIL PROCEDURE vol 11 (2009) PARA 1090.

8 *Dalrymple v Dalrymple* (1811) 2 Hag Con 54; *Trimbey v Vignier* (1834) 1 Bing NC 151; *Earl Nelson v Lord Bridport* (1845) 8 Beav 527; *Bremer v Freeman* (1857) 10 Moo PCC 306; *Concha v Murrieta*, *De Mora v Concha* (1889) 40 ChD 543, CA; *Guaranty Trust Co of New York v Hannay & Co* [1918] 2 KB 623, CA; *Buerger v New York Life Assurance Co* (1927) 96 LJB 930, CA; *Re Duke of Wellington*, *Glentanar v Wellington* [1947] Ch 506, [1947] 2 All ER 854; *Re Fuld's Estate (No 3)*, *Hartley v Fuld* [1968] P 675 at 700-703; *Qureshi v Qureshi* [1972] Fam 173 at 195-197, [1971] 1 All ER 325 at 341-343; *Bumper Development Corp v Metropolitan Police Comr* [1991] 4 All ER 638, [1991] 1 WLR 1362, CA; and see CIVIL PROCEDURE vol 11 (2009) PARA 1090. The court's general approach to the proving of foreign law is discussed in *Macmillan Inc v Bishopsgate Investment Trust plc (No 4)* (1998) Times, 7 December, CA (where there are no foreign authorities precisely in point and expert witnesses cannot agree, the Court of Appeal may form a view with due regard paid to the relevant circumstances as found by the trial judge).

9 *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, HL.

10 Civil Evidence Act 1972 s 4(2).

11 The finding or decision must have been made: (1) in proceedings at first instance in the High Court, Crown Court, quarter sessions (now abolished) or the Lancaster or Durham Chancery Court (now abolished) (*ibid* s 4(4)(a)); or (2) by any court hearing an appeal from any of the foregoing (s 4(4)(b)); or (3) by the Privy Council (whether to Her Majesty in Council or to the Judicial Committee as such) when hearing an appeal from any court outside the United Kingdom (s 4(4)(c)).

12 *Ie* which are reported or recorded in writing in a report, transcript or other document which, if the question in relation to the determination of which they are cited had been a question as to the law of England, could be cited as an authority in legal proceedings in England: see *ibid* s 4(2), (5).

13 *Ibid* s 4(2)(a). Notice must be given to every other party to the proceedings in accordance with rules of court: s 4(3). The appropriate rule is CPR 33.7 (see CIVIL PROCEDURE vol 11 (2009) PARA 1089).

14 Civil Evidence Act 1972 s 4(2)(b); and *Phoenix Maritime Inc v China Ocean Shipping Co* [1999] 1 All ER (Comm) 138, [1999] CLC 478.

15 Civil Evidence Act 1972 s 4(2) proviso, disapplying s 4(2) in the case of a finding or decision which conflicts with another finding or decision on the same question adduced by virtue of s 4(2) in the same proceedings. At common law see eg *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, HL; *Ottoman Bank of Nicosia v Chakarian* [1938] AC 260, [1937] 4 All ER 570, PC.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(5) EXCLUSION OF FOREIGN LAW/30. Foreign law generally applied.

(5) EXCLUSION OF FOREIGN LAW

30. Foreign law generally applied.

Where by English¹ choice of law rules a foreign law is applicable to a case, the English court will generally apply that law even though the result may be contrary to a policy of English law which the court would apply in a purely domestic case². Thus the English court will generally enforce a contract which is valid by its governing law³, even if it is made without consideration⁴, or is champertous⁵, or ousts the jurisdiction of a foreign court⁶, or is for a loan which is irrecoverable under English domestic law⁷. Similarly, in cases involving personal status, the English court has recognised polygamy⁸, marriage by proxy⁹, marriage within the English prohibited degrees¹⁰, and marriage below the age of consent¹¹.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See the cases cited in notes 4-11 infra.

3 As to the law applicable to a contract see para 349 et seq post.

4 *Re Bonacina, Le Brasseur v Bonacina* [1912] 2 Ch 394, CA.

5 *Re Trepca Mines Ltd (No 2)* [1963] Ch 199 at 218, [1962] 3 All ER 351 at 354, CA (litigation in foreign country); contrast *Grell v Levy* (1864) 16 CBNS 73; *Trendtex Trading Corp v Crédit Suisse* [1982] AC 679, [1981] 3 All ER 520, HL (litigation in England). See para 31 note 14 post.

6 *Addison v Brown* [1954] 2 All ER 213 at 217, [1954] 1 WLR 779 at 784.

7 *Saxby v Fulton* [1909] 2 KB 208, CA (betting loan); *Shrichand & Co v Lacon* (1906) 22 TLR 245 (loan at rate of interest in excess of that permitted by English Moneylenders Acts). See generally para 358 post.

8 *Baindail (otherwise Lawson) v Baindail* [1946] P 122, [1946] 1 All ER 342, CA. See para 239 post.

9 *Apt v Apt* [1948] P 83, [1947] 2 All ER 677, CA. See para 209 post.

10 *Re Bozzelli's Settlement, Husey-Hunt v Bozzelli* [1902] 1 Ch 751; *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85, [1962] 3 All ER 873; and see para 228 post.

11 *Alhaji Mohamed v Knott* [1969] 1 QB 1, [1968] 2 All ER 563, DC. See para 229 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(5) EXCLUSION OF FOREIGN LAW/31. Public policy.

31. Public policy.

Exceptionally, the English¹ court will not enforce or recognise a right conferred or a duty imposed by a foreign law where, on the facts of the particular case, enforcement or, as the case may be, recognition, would be contrary to a fundamental policy of English law². The court has, therefore, refused in certain cases to apply foreign law where to do so would in the particular circumstances be contrary to the interests of the United Kingdom³ or contrary to justice or morality⁴. So, in cases involving personal status, the English court will refuse to recognise a penal⁵ status existing under a foreign law⁶ or a penal incapacity or disability imposed by that law⁷. Foreign decrees affecting status may in certain cases be refused recognition on grounds of public policy⁸; and the court retains a residual discretion to refuse to recognise a foreign status where, on the facts of the particular case, recognition would be unjust or unconscionable⁹. However, this discretion is one to be most sparingly exercised¹⁰.

The application of a rule of law which forms part of the law applicable to a contract may be refused if to apply it would be manifestly incompatible with English public policy¹¹. In cases decided before the statutory provision to this effect was enacted, the English court refused to enforce a contract entered into under duress¹² and a contract to trade with the enemy¹³, although in each case the contract was valid by its proper law; and it has also refused to enforce a champertous contract¹⁴, a contract in restraint of trade¹⁵, and a contract to procure a divorce¹⁶.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See *Robinson v Bland* (1760) 2 Burr 1077; *Hope v Hope* (1857) 8 De GM & G 731; *Grell v Levy* (1864) 16 CBNS 73; *Sottomayor v De Barros* (1877) 3 PD 1 at 7, CA; *Rousillon v Rousillon* (1880) 14 ChD 351 at 369; *Kaufman v Gerson* [1904] 1 KB 591, CA; *Dynamit AG v Rio Tinto Co Ltd* [1918] AC 292, HL; *Baindail (otherwise Lawson) v Baindail* [1946] P 122 at 128-129, [1946] 1 All ER 342 at 346-347, CA; *Re Langley's Settlement Trusts, Lloyds Bank Ltd v Langley* [1962] Ch 541, [1961] 3 All ER 803, CA; *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85 at 98-99, [1962] 3 All ER 873 at 882-883; and see the text and notes infra.

3 *De Wütz v Hendricks* (1824) 2 Bing 314; *Rousillon v Rousillon* (1880) 14 ChD 351; *Dynamit AG v Rio Tinto Co Ltd* [1918] AC 292, HL. For the meaning of 'United Kingdom' see para 4 ante.

4 *Sottomayor v De Barros* (1877) 3 PD 1 at 7, CA; *Sottomayer v De Barros (No 2)* (1879) 5 PD 94; *Kaufman v Gerson* [1904] 1 KB 591, CA; *Chetti v Chetti* [1909] P 67; *Re Langley's Settlement Trusts, Lloyds Bank Ltd v Langley* [1962] Ch 541, [1961] 3 All ER 803, CA; *Gray (otherwise Formosa) v Formosa* [1963] P 259, [1962] 3 All ER 419, CA; *Lepre v Lepre* [1965] P 52, [1963] 2 All ER 49; *Kuwait Airways Corpn v Iraq Airways Co (No 3)* [2001] 1 Lloyd's Rep 161. Cf *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85 at 98-99, [1962] 3 All ER 873 at 882-883; *Re Fuld's Estate (No 3)*, *Hartley v Fuld* [1968] P 675 at 698, [1965] 3 All ER 776 at 781. See also *Empresa Exportadora De Azucar v Industria Azucarera Nacional SA, The Playa Larga and The Marble Islands* [1983] 2 Lloyd's Rep 171 at 190, CA.

5 ie discriminatory, as distinct from 'penal' in the sense in which the word is used in para 32 post.

6 *Re Metcalfe's Trusts* (1864) 2 De GJ & Sm 122 ('civil death' on entering a religious order); *Baindail (otherwise Lawson) v Baindail* [1946] P 122 at 128, [1946] 1 All ER 342 at 346, CA; *Regazzoni v KC Sethia (1944) Ltd* [1956] 2 QB 490 at 524, [1956] 2 All ER 487 at 496, CA, per Parker LJ (on appeal [1958] AC 301, [1957] 3 All ER 286, HL) (slavery); but see *Santos v Illidge* (1860) 8 CBNS 861.

7 See *Worms v De Valdor* (1880) 49 LJCh 261; *Re Selot's Trust* [1902] 1 Ch 488 (refusal to recognise incapacity imposed by French law upon French prodigal), applied in *Re Langley's Settlement Trusts, Lloyds Bank Ltd v Langley* [1962] Ch 541, [1961] 3 All ER 803, CA (Californian 'incompetent'). As to capacity to contract see para 364 post; and as to incapacity to marry see para 231 post. As to governmental seizure of property see para 423 post. See also *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368, [1986] 1 All ER 129 (foreign confiscatory laws which are discriminatory so as to constitute an infringement of human rights

ought not to be recognised); *Oppenheimer v Cattermole (Inspector of Taxes)* [1973] Ch 264, [1972] 3 All ER 1106, CA (affd on other grounds [1976] AC 249, [1975] 1 All ER 538, HL); *Kuwait Airways Corpn v Iraqi Airways Co (No 3)* [2001] 1 Lloyd's Rep 161 (foreign confiscatory laws which are in breach of fundamental principles of international law ought not to be recognised).

8 See para 259 post.

9 *Re Langley's Settlement Trusts, Lloyds Bank Ltd v Langley* [1962] Ch 541 at 555, 557-558, [1961] 3 All ER 803 at 807, 809, CA; *Russ (otherwise Geffers) v Russ (Russ otherwise De Waele intervening)* [1964] P 315 at 327-328, 334-335, [1962] 3 All ER 193 at 199, 203, CA; *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85 at 98, [1962] 3 All ER 873 at 882-883; *Qureshi v Qureshi* [1972] Fam 173 at 201, [1971] 1 All ER 325 at 346.

10 *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85 at 98-99, [1962] 3 All ER 873 at 882-883; *R v Brentwood Superintendent Registrar of Marriages, ex p Arias* [1968] 2 QB 956 at 968-969, 971, [1968] 3 All ER 279 at 282-283, 285, DC; *Qureshi v Qureshi* [1972] Fam 173 at 201, [1971] 1 All ER 325 at 346; and see *Vervaeke (formerly Messina) v Smith* [1983] 1 AC 145 at 164, HL, per Lord Simon of Glaisdale.

11 Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L226, 9.10.80, p 1) art 16 (set out in the Contracts (Applicable Law) Act 1990 s 2(1), Sch 1): see para 358 post.

12 *Kaufman v Gerson* [1904] 1 KB 591, CA. Cf *Re Meyer* [1971] P 298, [1971] 1 All ER 378 (divorce decree obtained under duress).

13 *Dynamit AG v Rio Tinto Co Ltd* [1918] AC 292, HL. See also CONTRACT vol 9(1) (Reissue) para 849.

14 *Grell v Levy* (1864) 16 CBNS 73; *Trendtex Trading Corpn v Crédit Suisse* [1982] AC 679, [1981] 3 All ER 520, HL. This is certainly true where the litigation is in England. The opposite is true where the litigation is in a foreign country by whose law champerty is lawful: see *Re Trepca Mines Ltd (No 2)* [1963] Ch 199 at 218, [1962] 3 All ER 351 at 354, CA; para 30 ante; and Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 84. For the meaning of 'the proper law (of a contract)' see para 349 note 7 post.

15 *Rousillon v Rousillon* (1880) 14 ChD 351 (restraint of trade in England). Cf *Apple Corpn Ltd v Apple Computer Inc* [1992] FSR 431.

16 *Hope v Hope* (1857) 8 De GM & G 731 (divorce in England). Note that collusion is no longer a bar to the granting of a divorce decree: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 415.

UPDATE

31 Public policy

TEXT AND NOTES--The Mental Capacity Act 2005 Sch 3 makes provision in relation to persons who cannot protect their interests, governing which jurisdiction should apply when a national of one country is in another state: see Mental Capacity Act 2005 Sch 3; and PARA 14A.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(5) EXCLUSION OF FOREIGN LAW/32. Foreign penal law.

32. Foreign penal law.

The English¹ court will not enforce a foreign penal law, either directly or indirectly². A penal law is one which imposes punishment for some breach of duty to the state, as opposed to a remedial law directed to securing compensation for a private person who has suffered damage as a result of a breach of duty owed to him³. The question whether a foreign law is penal is determined by the English court⁴ and is not affected by the view taken by the courts of the foreign country⁵. A sum of money claimed to be due to a claimant in an English court under the provisions of a foreign law is not considered as a penalty unless it is recoverable only at the instance of the foreign state concerned or by one of its officials as such or by a common informer⁶. Where a particular foreign law is partly penal and partly remedial, the English court will only enforce rights arising out of the part which is remedial⁷. Although the English court will not enforce a foreign penal law, it may recognise it for other purposes⁸.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Huntington v Attrill* [1893] AC 150, PC; *Folliott v Ogden* (1789) 1 Hy Bl 124 (affd sub nom *Ogden v Folliott* (1790) 3 Term Rep 726; on appeal (1792) 4 Bro Parl Cas 111, HL); *Wolff v Oxholm* (1817) 6 M & S 92; *Le Louis* (1817) 2 Dods 210; *Banco de Vizcaya v Don Alfonso de Borbon y Austria* [1935] 1 KB 140; *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368, [1986] 1 All ER 129; *United States of America v Inkley* [1989] QB 255, [1988] 3 All ER 144, CA. As to governmental seizure of property see paras 422-423 post.

3 *Huntington v Attrill* [1893] AC 150 at 156, PC. It is possible to view the court's reluctance to enforce penal law as a refusal to assist the assertion of sovereign authority by one state within the territory of another: *Government of India, Ministry of Finance (Revenue Division) v Taylor* [1955] AC 491, [1955] 1 All ER 292, HL; *Re State of Norway's Application, Re State of Norway's Application (No 2)* [1990] 1 AC 723, sub nom *Re State of Norway's Applications (Nos 1 and 2)* [1989] 1 All ER 745, HL.

4 This is consistent with the general principle that the *lex fori* governs such matters. As to the *lex fori* see para 11 ante.

5 *Huntington v Attrill* [1893] AC 150 at 155, PC; *A-G for New Zealand v Ortiz* [1984] AC 1, [1983] 2 All ER 93, HL; *Larkins v National Union of Mineworkers* [1985] IR 671. However, see *United States of America v Inkley* [1989] QB 255 at 265, [1988] 3 All ER 144 at 150, CA, where it was stated that serious attention will be paid to the views of the foreign court, which may on occasions be decisive.

6 *Huntington v Attrill* [1893] AC 150 at 157-158, PC.

7 *Raulin v Fischer* [1911] 2 KB 93; and see para 157 post.

8 *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 at 322, [1957] 3 All ER 286 at 292, HL. Cf para 33 post. See also *Oppenheimer v Cattermole (Inspector of Taxes)* [1973] Ch 264, [1972] 3 All ER 1106, CA; affd on other grounds [1976] AC 249, [1975] 1 All ER 538, HL (deprivation of Jew's German nationality).

UPDATE

32 Foreign penal law

NOTE 7--See also *Islamic Republic of Iran v Barakat Galleries Ltd* [2007] EWCA Civ 1374, [2008] 1 All ER 1177 (fact that some provisions imposed penalties did not render penal all other provisions of enactment). It is the substance of what is being sought to be enforced which is important: *United States Securities and Exchange Commission v Manterfield* [2009] EWCA Civ 27, [2009] 2 All ER (Comm) 941.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(5) EXCLUSION OF FOREIGN LAW/33. Foreign revenue law.

33. Foreign revenue law.

The English¹ court will not enforce a foreign revenue law, either directly or indirectly². The characterisation of a foreign law as a revenue law is determined by the English court³. An action to collect the taxes of a foreign country will not be entertained in England, irrespective of the identity of the claimant⁴ or the form in which it is brought⁵. Although the English court will not enforce a foreign revenue law, it may recognise it for other purposes⁶.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Government of India, Ministry of Finance (Revenue Division) v Taylor* [1955] AC 491, [1955] 1 All ER 292, HL (capital gains tax); *Holman v Johnson* (1775) 1 Cowp 341 at 343 (customs duty); *Planché v Fletcher* (1779) 1 Doug KB 251 at 253 (customs duty); *James v Catherwood* (1823) 3 Dow Ry KB 190 at 191 (stamp duty); *Sydney Municipal Council v Bull* [1909] 1 KB 7 (rates); *Cotton v R* [1914] AC 176 at 195, PC (succession duty); *Indian and General Investment Trust Ltd v Borax Consolidated Ltd* [1920] 1 KB 539 at 550 (income tax); *Re Visser, Queen of Holland v Drukker* [1928] Ch 877 (succession duty); *Re Cohen (A Bankrupt)* [1950] 2 All ER 36 at 39, CA (income tax); *Rossano v Manufacturers' Life Insurance Co* [1963] 2 QB 352 at 376-378, [1962] 2 All ER 214 at 228-229; *Brokaw v Seatrain UK Ltd* [1971] 2 QB 476, [1971] 2 All ER 98, CA; *A-G for Canada v Schulze & Co* (1901) 9 SLT 4 (customs duty); *Peter Buchanan Ltd and Macharg v McVey* [1955] AC 516n, [1954] IR 89 (profits tax); *Metal Industries (Salvage) Ltd v Harle (Owners)* 1962 SLT 114 (national insurance contributions); *Re Lord Cable, Garratt v Waters* [1976] 3 All ER 417, [1977] 1 WLR 7. Cf *Re State of Norway's Application, Re State of Norway's Application (No 2)* [1990] 1 AC 723, sub nom *Re State of Norway's Applications (Nos 1 and 2)* [1989] 1 All ER 745 (assisting foreign court to obtain evidence for proceedings to enforce a revenue law in the foreign country did not constitute enforcement, direct or indirect).

The rule that English courts will not directly or indirectly enforce the revenue laws of another country is not overridden by the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels on 27 September 1968 (see para 65 post): *QRS 1 ApS v Frandsen* [1999] 3 All ER 289, [1999] 1 WLR 2169, CA.

3 This is a matter for English law as the *lex fori*. See also Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 93-94. As to the *lex fori* see para 11 ante.

4 *Peter Buchanan Ltd and Macharg v McVey* [1955] AC 516n, [1954] IR 89 (claim by liquidator in winding up of company); approved in *Government of India, Ministry of Finance (Revenue Division) v Taylor* [1955] AC 491 at 510-511, [1955] 1 All ER 292 at 298-299, HL.

5 *Rossano v Manufacturers' Life Insurance Co* [1963] 2 QB 352, [1962] 2 All ER 214 (garnishee order in respect of tax due by claimant in foreign country raised as defence to action for debt); *Brokaw v Seatrain UK Ltd* [1971] 2 QB 476, [1971] 2 All ER 98, CA (claim to possessory interest in goods by virtue of notice of levy in respect of unpaid tax). See also *Air India Ltd v Caribjet Inc* [2002] 2 All ER (Comm) 76 (action for repayment of sum paid by the claimant's representative to a foreign country's revenue does not constitute indirect enforcement of that country's revenue law).

6 *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 at 319-322, [1957] 3 All ER 286 at 290-292, HL; *Re Emery's Investment Trusts, Emery v Emery* [1959] Ch 410, [1959] 1 All ER 577.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/1. INTRODUCTION/(5) EXCLUSION OF FOREIGN LAW/34. Foreign public law.

34. Foreign public law.

Although the scope of the principle remains unclear, the English court will not enforce the public law of a foreign country¹.

¹ See *United States of America v Inkley* [1989] QB 255, [1988] 3 All ER 144, CA; *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, Aust HC. Cf *A-G for New Zealand v Ortiz* [1984] AC 1, [1983] 2 All ER 93, HL; *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368, [1986] 1 All ER 129, HL; *Re State of Norway's Application, Re State of Norway's Application (No 2)* [1990] 1 AC 723, sub nom *Re State of Norway's Applications (Nos 1 and 2)* [1989] 1 All ER 745 (there existed a category of foreign law that was neither revenue law nor penal law which was nevertheless unenforceable in England). See also Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 89-100. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(1) NATURE OF DOMICILE/35. Function and meaning of 'domicile'.

2. DOMICILE AND RESIDENCE

(1) NATURE OF DOMICILE

35. Function and meaning of 'domicile'.

Many questions concerning the personal status of an individual are governed by his personal law. The primary purpose of determining domicile is to identify this personal law by considering factors which connect the person to a territory with a distinctive legal system. Domicile defines the legal relationship between the individual and that legal system which is invoked as his personal law¹. Domicile in the sense here examined is to be distinguished from the distinct concept used for the purposes of the Civil Jurisdiction and Judgments Acts 1982 and 1991, and the Civil Jurisdiction and Judgments Order 2001².

A person is domiciled in that country in which he either has or is deemed by law to have his permanent home³. Every individual is regarded as belonging, at every stage in his life, to some community consisting of all persons domiciled in a particular country; the rules as to domicile are such that this legal idea may not correspond to social reality⁴. Although a person may have no permanent home, the law requires him to have a domicile⁵. He may have more than one home, but he can have only one domicile for any one purpose⁶. He may have his home in one country, but be deemed to be domiciled in another⁷.

The relationship of domicile is between a person and a country, and never arises from membership of a group as distinguished from the country in which the group is domiciled; but the municipal law of the country of domicile may itself distinguish between classes of its subjects, and apply different rules according to the race, caste, creed or other characteristics of a particular person, so that even after the domicile has been ascertained it may also be necessary to inquire into the other characteristics of the individual before the particular rule applicable to his case can be known⁸.

1 *Henderson v Henderson* [1967] P 77 at 79, [1965] 1 All ER 179 at 180-181. In many foreign legal systems, the personal law is the law of an individual's nationality, and English law is giving increasing weight to nationality in matters of personal status: *Indyka v Indyka* [1969] 1 AC 33 at 80, 96-97, 111, [1967] 2 All ER 689 at 710-711, 721, 730, HL; and see paras 254, 343 post. As to the meanings of 'England', 'English' and 'English law' see para 4 post. For proposals for the reform of the law see *The Law of Domicile* (Law Com no 168) (1987).

2 *le the Civil Jurisdiction and Judgments Order 2001*, SI 2001/3929: see para 84 et seq post.

3 *Winans v A-G* [1904] AC 287 at 288, HL; *Whicker v Hume* (1858) 7 HL Cas 124 at 160; *Henderson v Henderson* [1967] P 77 at 79, [1965] 1 All ER 179 at 180-181. As to the domicile of a corporation see para 469 post. The difficulty of defining domicile is discussed in *Forbes v Forbes* (1854) Kay 341 and in *A-G v Lady Rowe* (1862) 1 H & C 31. The legal notion of domicile must be distinguished from the idea of residence, more or less permanent, which the word 'domicile' bears in some foreign systems and in common speech: *McMullen v Wadsworth* (1889) 14 App Cas 631, PC; *Le Mesurier v Le Mesurier* [1895] AC 517, PC.

4 *Udny v Udny* (1869) LR 1 Sc & Div 441 at 457, HL; *Bell v Kennedy* (1868) LR 1 Sc & Div 307 at 320, HL; *Indyka v Indyka* [1969] 1 AC 33 at 97, [1967] 2 All ER 689 at 721, HL.

5 *Re Craignish, Craignish v Hewitt* [1892] 3 Ch 180 at 192, CA; *Bell v Kennedy* (1868) LR 1 Sc & Div 307, HL; *Udny v Udny* (1869) LR 1 Sc & Div 441 at 453, HL.

6 *Somerville v Lord Somerville* (1801) 5 Ves 750; *Udny v Udny* (1869) LR 1 Sc & Div 441, HL; *Bell v Kennedy* (1868) LR 1 Sc & Div 307, HL; *Re Steer* (1858) 3 H & N 594 at 599; *Saccharin Corp'n Ltd v Chemische Fabrik von Heyden AG* [1911] 2 KB 516 at 527, CA; *Garthwaite v Garthwaite* [1964] P 356 at 379, [1964] 2 All ER 233 at

236, CA. Contrast the rules as to nationality; an individual may have dual nationality or may be stateless: see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 392 et seq. See also BRITISH NATIONALITY, IMMIGRATION AND ASYLUM.

7 See eg paras 49, 51-52 post.

8 *Abd-ul-Messih v Farra* (1888) 13 App Cas 431, PC; *Maltass v Maltass* (1844) 1 Rob Eccl 67; *Casdagli v Casdagli* [1919] AC 145 at 163, HL; *Re Askew, Marjoribanks v Askew* [1930] 2 Ch 259 at 270.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(1) NATURE OF DOMICILE/36. Area of domicile.

36. Area of domicile.

Each person who has, or whom the law deems to have, his permanent home within the territorial limits of a single system of law is domiciled in the country over which the system extends; and he is domiciled in the whole of that country, even though his home may be fixed at a particular spot within it¹. In federal states, some branches of law are within the competence of the federal authorities and for these purposes the whole federation will be subject to a single system of law, and an individual may be spoken of as domiciled in the federation as a whole; other branches of law are within the competence of the states or provinces of the federation, and the individual will be domiciled in one state or province only².

1 *Re Capdevielle* (1864) 2 H & C 985 at 1018 per Pollock CB (dissenting).

2 As to the area of domicile and related questions see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 109 et seq.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(1) NATURE OF DOMICILE/37. Law determining domicile.

37. Law determining domicile.

An English court must determine the question whether or not a domicile has been acquired for the purposes of an English choice of law rule solely by reference to the principles of English law¹. It follows that a decision of the court of a foreign country that an individual is or is not domiciled in that country is immaterial, although this principle is subject to a statutory exception². Similarly, in determining the domicile of an individual, the English court will disregard foreign legislation imposing restrictions on the acquisition of domicile in the foreign state³.

1 *Re Annesley, Davidson v Annesley* [1926] Ch 692; *Re Martin, Loustalan v Loustalan* [1900] P 211 at 227, CA; *Re Askew, Marjoribanks v Askew* [1930] 2 Ch 259 at 266. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Ie* the Family Law Act 1986 s 46(5) (where the provision applies, domicile may be determined either according to English law or according to the law of the place where the divorce was obtained): see para 255 post.

3 *Re Annesley, Davidson v Annesley* [1926] Ch 692. For cases where the possibility of a foreign domicile, despite local regulations, was recognised but without clear exposition of the principle see *Collier v Rivaz* (1841) 2 Curt 855; *Anderson v Laneville* (1854) 9 Moo PCC 325; *Bremer v Freeman* (1857) 10 Moo PCC 306; *Hamilton v Dallas* (1875) 1 ChD 257.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(i) In general/38. Everyone has a domicile.

(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE

(i) In general

38. Everyone has a domicile.

Every person must have a personal law, and accordingly everyone must have a domicile. He receives at birth a domicile of origin which remains his domicile, wherever he goes, unless and until he acquires a new domicile (a domicile of choice)¹. Some authorities list a third type of domicile, enjoyed by a dependent person: a domicile of dependence².

¹ *Udny v Udny* (1869) LR 1 Sc & Div 441, HL; *Bell v Kennedy* (1868) LR 1 Sc & Div 307, HL. As to domicile of origin see para 40 post; and as to domicile of choice see para 41 et seq post.

² *Henderson v Henderson* [1967] P 77 at 79, 82, [1965] 1 All ER 179 at 180, 184. For many purposes, domicile of dependence may be regarded as one of choice or quasi-choice. As to domicile of dependence see paras 54-56 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(i) In general/39. Description of domicile.

39. Description of domicile.

The law attributes to everyone at birth a domicile which is called a domicile of origin. This domicile may be changed, and a new domicile, which is called a domicile of choice, acquired; but the two kinds of domicile differ in the following respects:

- 1 (1) the domicile of origin is received by operation of law at birth¹; the domicile of choice is acquired later by the individual actually moving to another country and intending to remain there indefinitely;
- 2 (2) the domicile of origin is retained until the acquisition of a domicile of choice²; it cannot be divested, although it remains in abeyance during the continuance of a domicile of choice; the domicile of choice is lost by abandonment whereupon the domicile of origin will revive unless some other domicile is acquired³; the domicile of choice is destroyed when it is once lost, but may be acquired anew by fulfilling the same conditions as are required in the first instance⁴;
- 3 (3) the domicile of origin is more durable than that of choice, in the sense that it is more difficult to establish a change of domicile when the domicile alleged to have been displaced is one of origin⁵.

1 The domicile of origin is fixed at birth, not (as was sometimes suggested) on attaining majority: *Henderson v Henderson* [1967] P 77, [1965] 1 All ER 179; *Forbes v Forbes* (1854) Kay 341 at 353; *Udny v Udny* (1869) LR 1 Sc & Div 441 at 457, HL; *Firebrace v Firebrace* (1878) 4 PD 63 at 66 (obiter); *Re Macreight, Paxton v Macreight* (1885) 30 ChD 165; *Re Craignish, Craignish v Hewitt* [1892] 3 Ch 180 at 184-185; *Harrison v Harrison* [1953] 1 WLR 865; *Re Flynn, Flynn v Flynn* [1968] 1 All ER 49 at 52, [1968] 1 WLR 103 at 108.

2 *Udny v Udny* (1869) LR 1 Sc & Div 441, HL; *Bell v Kennedy* (1868) LR 1 Sc & Div 307, HL; *Somerville v Lord Somerville* (1801) 5 Ves 750; *Munro v Munro* (1840) 7 Cl & Fin 842 at 876, HL; *Re Marrett, Chalmers v Wingfield* (1887) 36 ChD 400, CA.

3 See para 44 post.

4 *Fleming v Horniman* (1928) 138 LT 669.

5 See para 45 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(ii) Domicile of Origin/40. How domicile of origin is fixed.

(ii) Domicile of Origin

40. How domicile of origin is fixed.

The domicile of origin is determined by the domicile, at the time of the child's birth¹, of the person upon whom he is legally dependent. A legitimate child born in wedlock to a living father receives the domicile of the father at the time of the birth²; an illegitimate child receives the domicile of the mother³. A legitimate child born after the father has died receives the domicile of the mother⁴. The place of birth is immaterial⁵, except that it may be presumed to be the domicile of a child about whose parentage nothing is known; similarly the domicile of origin of a foundling is the country in which he is found⁶. After adoption, the domicile of origin of the adopted child is fixed as if he had been born to the adopters⁷.

1 See para 39 note 1 ante.

2 *Udny v Udny* (1869) LR 1 Sc & Div 441, HL; *Somerville v Lord Somerville* (1801) 5 Ves 750; *Forbes v Forbes* (1854) Kay 341; *Henderson v Henderson* [1967] P 77, [1965] 1 All ER 179; *Re Clore (No 2)*, *Official Solicitor v Clore* [1984] STC 609. As to the domicile of a child whose parents are living apart see para 55 post.

3 *Udny v Udny* (1869) LR 1 Sc & Div 441, HL; *Urquhart v Butterfield* (1887) 37 ChD 357 at 377 et seq, CA. This principle may apply also to an illegitimate child who has been legitimated: see Cheshire and North *Private International Law* (13th Edn, 1999) p 154.

4 See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 115.

5 *Somerville v Lord Somerville* (1801) 5 Ves 750 at 787; *Walcot v Botfield* (1854) Kay 534 at 544; *Peal v Peal* (1930) 46 TLR 645; *Re Flynn, Flynn v Flynn* [1968] 1 All ER 49 at 52, [1968] 1 WLR 103 at 108.

6 Cf *Re McKenzie* (1951) 51 SRNSW 293.

7 See the Adoption Act 1976 s 39(1), by which a child is treated in law as having been born as the child of the adopters (or one of them); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 375 et seq. See also the Adoption and Children Act 2002 s 67(1) (not yet in force), which preserves the effect of the Adoption Act 1976 s 39(1).

UPDATE

40 How domicile of origin is fixed

NOTE 7--Adoption and Children Act 2002 s 67(1) now in force: SI 2005/2897.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(iii) Domicile of Choice/41. Domicile of choice.

(iii) Domicile of Choice

41. Domicile of choice.

Any person not legally dependent upon another may at any time change his existing domicile and acquire for himself a domicile of choice by the fact of residing in a country other than that of his domicile of origin with the intention of continuing to reside there indefinitely¹.

¹ *Winans v A-G* [1904] AC 287, HL; *Marchioness of Huntly v Gaskell* [1906] AC 56, HL; *Udny v Udny* (1869) LR 1 Sc & Div 441, HL; *Bell v Kennedy* (1868) LR 1 Sc Div 307, HL; *Re Furse, Furse v IRC* [1980] 3 All ER 838; *Plummer v IRC* [1988] 1 All ER 97, [1988] 1 WLR 292.

UPDATE

41 Domicile of choice

NOTE 1--*Udny* and *Plummer*, both cited, applied in *Gaines-Cooper v Revenue and Customs Comrs* [2007] EWHC 2617 (Ch), [2008] STC 1665.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(iii) Domicile of Choice/42. Residence.

42. Residence.

In order to have acquired a domicile of choice in a country, an individual must have actually resided there¹. It is not sufficient that he intended to reside there in the future, nor that he actually set out on a journey to the new country, only to die on the way there². However, the test is a qualitative rather than a quantitative one³. In this context, residence means no more than personal presence in a country other than casually or as a traveller⁴. It is immaterial that the residence is of brief duration⁵, provided that it is accompanied by the required state of mind. Similarly, the motive for residence is immaterial except as evidence for the existence or non-existence of the necessary intention⁶. Illegal residence is insufficient⁷.

1 *Bell v Kennedy* (1868) LR 1 Sc & Div 307 at 319, HL; *Brown v Smith* (1852) 15 Beav 444; *Harrison v Harrison* [1953] 1 WLR 865.

2 *Udny v Udny* (1869) LR 1 Sc & Div 441 at 449-450, 453-454, HL; *Re Raffeneil's Goods* (1863) 3 Sw & Tr 49; *Bell v Kennedy* (1868) LR 1 Sc & Div 307 at 319, HL. Early dicta to the contrary would seem to be no longer good law: *Munroe v Douglas* (1820) 5 Madd 379 at 405; *Forbes v Forbes* (1854) Kay 341 at 353-354; and see *Lyll v Paton* (1856) 25 LJCh 746.

3 *Bowie (or Ramsay) v Liverpool Royal Infirmary* [1930] AC 588 at 595, 598, HL.

4 See further para 57 post. Cf *Plummer v IRC* [1988] 1 All ER 97, [1988] 1 WLR 292, suggesting that in cases of multiple residence, the test is where is the chief residence; and see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 118.

5 *Bell v Kennedy* (1868) LR 1 Sc & Div 307 at 319, HL; *Fasbender v A-G* [1922] 2 Ch 850 at 857-858, CA; *Stone v Stone* [1959] 1 All ER 194, [1958] 1 WLR 1287.

6 *Re Cooke's Trusts* (1887) 56 LJCh 637; cf *Drexel v Drexel* [1916] 1 Ch 251.

7 *Puttick v A-G* [1980] Fam 1, [1979] 3 All ER 463; *Solomon v Solomon* (1912) 29 WNNSW 68; *Smith v Smith* 1962 (3) SA 930. Cf the Immigration Act 1971 s 33(2); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 134. It is uncertain whether the principle applies where the residence is in a foreign country and the illegality arises under the law of that country. See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 118-119. As to the effect on domicile of possible or threatened deportation see para 50 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(iii) Domicile of Choice/43. Intention to remain.

43. Intention to remain.

In order to have acquired a domicile of choice, the individual must have had a certain state of mind, the *animus manendi*. He must have formed the intention of making his sole or principal permanent home in the country of residence, and of continuing to reside there indefinitely¹. Residence alone, unaccompanied by this state of mind, is always insufficient².

The intention which must be shown is as to the quality of the residence; it is not necessary to show that the person concerned intended to change his domicile³. A person can change his domicile without changing his nationality; conversely a change of nationality does not necessarily involve a change of domicile⁴.

An intention to reside in a country for a fixed period of time, or until some clearly foreseen and reasonably anticipated event happens, will not be sufficient⁵, but if the proper conclusion from all the circumstances is that the individual intends to make his home in a country for an indefinite time, he will acquire a domicile of choice there notwithstanding a continuing emotional attachment to some other country or an intention to change his residence upon some vague or improbable contingency⁶.

The individual need not intend, when he first arrives in the country where the domicile of choice is alleged to be acquired, to live there permanently. The intention may be, and often is, formed after the individual has resided there for some time. The acquisition of a domicile is complete as soon as the intention is formed⁷; no subsequent change of mind, or doubts arising as to the wisdom of the determination, can by themselves affect the domicile so acquired⁸.

The individual must determine to settle in a particular country, and not necessarily at a particular place⁹; but the absence of a fixed residence is important as evidence, and may be sufficient to show that the individual has not reached a final decision whether or not to reside in that country¹⁰.

1 The rival merits of 'permanently' and 'indefinitely' in definitions of the *animus manendi* were discussed in *Gulbenkian v Gulbenkian* [1937] 4 All ER 618; both are used in the leading judgments and they are treated as synonymous in *Re Edwards, Edwards v Edwards* (1969) 113 Sol Jo 108. As to the varieties of language see *Re Fuld's Estate (No 3)*, *Hartley v Fuld* [1968] P 675 at 682-683. The test is subjective: *Bheekhun v Williams* [1999] 2 FLR 229, CA. As to the proof of intention see para 46 post.

Traditionally, where a man has more than one place of residence, but establishes the home of his wife and family in one of them, this fact is important evidence that his domicile is in that place: *Forbes v Forbes* (1854) Kay 341; *Aitchison v Dixon* (1870) LR 10 Eq 589; *Platt v A-G of New South Wales* (1878) 3 App Cas 336, PC; *D'Etchegoyen v D'Etchegoyen* (1888) 13 PD 132; *A-G v Yule and Mercantile Bank of India* (1931) 145 LT 9, CA. See also *Haldane v Eckford* (1869) LR 8 Eq 631 (residence with grandchild). The evidence may, of course, be outweighed by other considerations: *Douglas v Douglas* (1871) LR 12 Eq 617 at 647; *Wahl v A-G* (1932) 147 LT 382, HL; *IRC v Bullock* [1976] 3 All ER 353, [1976] 1 WLR 1178, CA.

2 *Udny v Udny* (1869) LR 1 Sc & Div 441, HL; *Winans v A-G* [1904] AC 287, HL; *Bowie (or Ramsay) v Liverpool Royal Infirmary* [1930] AC 588, HL; *Re Clore (No 2)*, *Official Solicitor v Clore* [1984] STC 609; *Plummer v IRC* [1988] 1 All ER 97, [1988] 1 WLR 292.

3 *Qureshi v Qureshi* [1972] Fam 173 at 191, [1971] 1 All ER 325 at 338.

4 *Wahl v A-G* (1932) 147 LT 382, HL; *D'Etchegoyen v D'Etchegoyen* (1888) 13 PD 132; *Re Annesley, Davidson v Annesley* [1926] Ch 692 at 701; *Re Adams, Bank of Ireland Trustee Co Ltd v Adams, Hutchings and Parker* [1967] IR 424; *Re Fuld's Estate (No 3)*, *Hartley v Fuld* [1968] P 675 at 683; *Qureshi v Qureshi* [1972] Fam 173 at 190, [1971] 1 All ER 325 at 337. Dicta in early cases, especially *Moorhouse v Lord* (1863) 10 HL Cas 272,

that there must be an intent to cast off one's nationality, to 'become a Frenchman rather than an Englishman' or to 'change one's domicile' are no longer good law: *Udny v Udny* (1869) LR 1 Sc & Div 441 at 452, HL; *Douglas v Douglas* (1871) LR 12 Eq 617 at 644-645; *Re Fuld's Estate (No 3)*, *Hartley v Fuld* supra at 683-684.

5 *Moorhouse v Lord* (1863) 10 HL Cas 272 at 285 (residence for health reasons); cf *Re James, James v James* (1908) 98 LT 438; *Pitt v Pitt* (1864) 4 Macq 627, HL (absence while settlement reached with creditors); *Aikman v Aikman* (1861) 3 Macq 854, HL; *Re Martin, Loustalan v Loustalan* [1900] P 211, CA (limitation period); *IRC v Bullock* [1976] 3 All ER 353, [1976] 1 WLR 1178, CA (Canadian-born taxpayer lived in England for 44 years but retained domicile of origin as intended to return to Canada if his wife predeceased him); *Irvin v Irvin* [2001] 1 FLR 178 (extended absence caused by employment in the Netherlands did not establish a Dutch domicile while the intention to return to England upon retirement remained). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

6 *Re Fuld's Estate (No 3)*, *Hartley v Fuld* [1968] P 675 at 684-685; *Henderson v Henderson* [1967] P 77 at 80-81, [1965] 1 All ER 179 at 181. See also *Bruce v Bruce* (1790) 2 Bos & P 229, HL; *Doucet v Geoghegan* (1878) 9 ChD 441, CA (making one's fortune); *Anderson v Laneville* (1854) 9 Moo PCC 325 at 334 (the death of a mistress); *Stanley v Bernes* (1830) 3 Hag Ecc 373 ('panting for his native home'); *Re Capdevielle* (1864) 2 H & C 985; *A-G v Kent* (1862) 1 H & C 12; *A-G v Pottinger* (1861) 6 H & N 733 (remote possibility of recall to active service abroad); *Re Marrett, Chalmers v Wingfield* (1887) 36 ChD 400, CA ('vague and floating' ideas of residing elsewhere); *Re Furse, Furse v IRC* [1980] 3 All ER 838 (ill-defined onset of ill-health). See also *Pletinka v Pletinka (Boucher cited)* (1964) 109 Sol Jo 72 (intention to return to the Ukraine if it became independent was compatible with acquiring a domicile of choice in England).

7 *Udny v Udny* (1869) LR 1 Sc & Div 441 at 458, HL.

8 *Re Marrett, Chalmers v Wingfield* (1887) 36 ChD 400, CA; *Gulbenkian v Gulbenkian* [1937] 4 All ER 618.

9 *Bell v Kennedy* (1868) LR 1 Sc & Div 307 at 321, HL; *Aikman v Aikman* (1861) 3 Macq 854 at 881, HL; *Re Patience, Patience v Main* (1885) 29 ChD 976; *Re Eschmann* (1893) 9 TLR 426. Dicta to the contrary in *A-G v Dunn* (1840) 6 M & W 511 at 526 may simply reflect the politically fragmented condition of Italy at the time.

10 See *Re Patience, Patience v Main* (1885) 29 ChD 976.

UPDATE

43 Intention to remain

NOTE 1--A person can form the intention of making a country his permanent home even if his presence in that country is a criminal offence: see *Mark v Mark* [2005] UKHL 42, [2005] 3 All ER 912 (petitioner overstayed her leave to remain in the United Kingdom).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(iii) Domicile of Choice/44. Abandonment of domicile of choice.

44. Abandonment of domicile of choice.

A domicile of choice can be lost by abandonment. This process is the exact converse of its acquisition. It is necessary for the person concerned to cease to reside in the country of domicile, and also to cease to have the intention to return to it as his permanent home¹. Absence without the intention of abandonment is of no effect²; nor is intention without any actual change of residence³. Both the intention and the act must be demonstrated to be unequivocal, though the evidence necessary to establish abandonment is less than that required to establish acquisition⁴.

It is never necessary to acquire another domicile of choice in order to abandon an earlier domicile of choice, but the individual may be said to have abandoned one domicile of choice and to have acquired another at the same time when either: (1) the old is abandoned and the new is acquired by the same act; or (2) the individual, while already residing in the new domicile, forms an intention to settle there and to abandon the old domicile⁵.

In every other case the domicile of origin revives to become again the actual domicile⁶.

1 *Udny v Udny* (1869) LR 1 Sc & Div 441, HL; *Re Marrett, Chalmers v Wingfield* (1887) 36 ChD 400, CA; *Urquhart v Butterfield* (1887) 37 ChD 357, CA; *Re Bianchi's Goods* (1862) 3 Sw & Tr 16; *King v Foxwell* (1876) 3 ChD 518; *Fleming v Horniman* (1928) 138 LT 669. It is sufficient to show that the person has ceased to have all intention to return; he need not have formed any positive intention not to return: *Re Flynn, Flynn v Flynn* [1968] 1 All ER 49, [1968] 1 WLR 103; *Qureshi v Qureshi* [1972] Fam 173 at 191, [1971] 1 All ER 325 at 338; *Plummer v IRC* [1988] 1 All ER 97, [1988] 1 WLR 292.

2 *Craigie v Lewin* (1843) 3 Curt 435; *A-G v Pottinger* (1861) 6 H & N 733; *Bradford v Young* (1885) 29 ChD 617, CA; *Re Lloyd Evans, National Provincial Bank v Evans* [1947] Ch 695; *Re S (No 2) (Hospital Patient)* [1996] 1 FLR 167.

3 *Re Raffanel's Goods* (1863) 3 Sw & Tr 49; *Zanelli v Zanelli* (1948) 64 TLR 556, CA.

4 *Re Lloyd Evans, National Provincial Bank v Evans* [1947] Ch 695 at 701, 708; *Travers v Holley* [1953] P 246 at 252, [1951] 2 All ER 794 at 797, CA, per Jenkins LJ (dissenting); *Re Flynn, Flynn v Flynn* [1968] 1 All ER 49 at 58, [1968] 1 WLR 103 at 115.

5 See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 134.

6 *Udny v Udny* (1869) LR 1 Sc & Div 441, HL; *King v Foxwell* (1876) 3 ChD 518; *Harrison v Harrison* [1953] 1 WLR 865; *Tee v Tee* [1973] 3 All ER 1105, [1974] 1 WLR 213, CA. It is questionable whether this revival rule applies where the domicile of origin is technical only and not 'bottomed in reality': *Re Flynn, Flynn v Flynn* [1968] 1 All ER 49 at 52, [1968] 1 WLR 103 at 108 per Megarry J.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(iv) Change of Domicile/45. Proof of change of domicile.

(iv) Change of Domicile

45. Proof of change of domicile.

There is a presumption against a change of domicile. The burden of proving any change of domicile rests therefore upon the person alleging it¹. A change of domicile is a serious matter, not to be lightly inferred, and it must be clearly and unequivocally proved². Differing views have been expressed as to whether the standard of proof is the normal civil standard³, or some higher standard⁴.

The task of proving a change of domicile is particularly onerous when the domicile alleged to be displaced is one of origin as opposed to one of choice⁵. Similarly, a high degree of proof may be required to establish a change in domicile where the two countries are markedly dissimilar in language, climate or ethnic, cultural or religious background⁶. The court's caution in such cases in inferring changes of domicile is based on the observed infrequency of such changes, and there is no rule of law preventing the inference being drawn where the change of domicile is clearly established⁷.

1 *Munro v Munro* (1840) 7 Cl & Fin 842 at 891, HL; *Aikman v Aikman* (1861) 3 Macq 854, HL; *Bell v Kennedy* (1868) LR 1 Sc & Div 307 at 316, HL; *The Lauderdale Peerage* (1885) 10 App Cas 692 at 739, HL; *Winans v A-G* [1904] AC 287, HL; *Rudd v Rudd* [1924] P 72; *A-G v Yule and Mercantile Bank of India* (1931) 145 LT 9, CA; *IRC v Cohen* (1937) 21 TC 301; *Stransky v Stransky* [1954] P 428, [1954] 2 All ER 536.

2 *Re Fuld's Estate (No 3)*, *Hartley v Fuld* [1968] P 675 at 685-686; *Re Flynn, Flynn v Flynn* [1968] 1 All ER 49 at 58, [1968] 1 WLR 103 at 115; *Re Edwards, Edwards v Edwards* (1969) 113 Sol Jo 108; *Moorhouse v Lord* (1863) 10 HL Cas 272 at 286; *Re Lloyd Evans, National Provincial Bank v Evans* [1947] Ch 695 at 707.

3 Ie the balance of probabilities: see *Re Fuld's Estate (No 3)*, *Hartley v Fuld* [1968] P 675 at 685-686.

4 *Henderson v Henderson* [1967] P 77 at 80, [1965] 1 All ER 179 at 181, where the domicile alleged to have been displaced was one of origin; *Buswell v IRC* [1974] 2 All ER 520, [1974] 1 WLR 1631, CA.

5 *Winans v A-G* [1904] AC 287 at 291, HL; *Bowie (or Ramsay) v Liverpool Royal Infirmary* [1930] AC 588, HL; *Henderson v Henderson* [1967] P 77, [1965] 1 All ER 179; *Holden v Holden* [1968] NI 7; *Re Clore (No 2)*, *Official Solicitor v Clore* [1984] STC 609; *Plummer v IRC* [1988] 1 All ER 97, [1988] 1 WLR 292.

6 *Whicker v Hume* (1858) 7 HL Cas 124 at 159; *Casdagli v Casdagli* [1919] AC 145 at 156-157, HL; *Henderson v Henderson* [1967] P 77 at 82, [1965] 1 All ER 179 at 183; *Qureshi v Qureshi* [1972] Fam 173 at 193, [1971] 1 All ER 325 at 339-340.

7 *Qureshi v Qureshi* [1972] Fam 173 at 193, [1971] 1 All ER 325 at 339-340, where Sir Jocelyn Simon P described the proposition in the text to note 6 supra as 'not so much a proposition of law as an expression of common experience'. Early authorities suggesting that an Englishman could not acquire a domicile in a non-Christian country were overruled in *Casdagli v Casdagli* [1919] AC 145, HL.

UPDATE

45 Proof of change of domicile

NOTE 4--*Henderson*, cited, applied in *R v R (divorce: jurisdiction: domicile)* [2006] 1 FLR 389.

NOTE 5--See also *Henwood v Barlow Clowes International Ltd (in liquidation)*[2007] EWHC 1579 (Ch), [2007] BPIR 1329 (revsd on a different point [2008] EWCA Civ 577, [2008] BPIR 778, [2008] All ER (D) 330 (May)).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(iv) Change of Domicile/46. Evidence of domicile.

46. Evidence of domicile.

Any act, event or circumstance in the life of an individual may be evidence from which the state of his mind may be inferred with more or less precision; every aspect of his life, his actions and statements may be adduced. It is impossible to formulate any general rule by which the weight due to any particular piece of evidence may be determined. Not only does the strength of the evidence from which the intention may be inferred vary according to the inherent probability or improbability of an alleged change of domicile, but the importance of similar facts may differ absolutely in different cases. The age, character and general circumstances of the person, and the climate, religion and customs of the country in which the domicile is alleged to have been acquired, are considerations which may cause the value of a particular fact to vary almost indefinitely¹.

The intention must be clearly and unequivocally proved², but it is unreasonable to require it to be proved by evidence which the person himself might not fairly be expected to have furnished if he had in fact formed the intention³, and it is not necessary to prove any conscious deliberate decision at any particular moment⁴.

Conduct subsequent to the time at which the state of mind has to be determined may be regarded⁵.

1 *Drevon v Drevon* (1864) 34 LJCh 129 at 133; *Sharpe v Crispin* (1869) LR 1 P & D 611 at 619; *Re Fuld's Estate (No 3)*, *Hartley v Fuld* [1968] P 675 at 682; *Re Flynn, Flynn v Flynn* [1968] 1 All ER 49 at 51, [1968] 1 WLR 103 at 107; *Bheekhun v Williams* [1999] 2 FLR 229, CA.

2 *Re Lloyd Evans, National Provincial Bank v Evans* [1947] Ch 695 at 707; *Travers v Holley* [1953] P 246 at 252, [1953] 2 All ER 794 at 797, CA, per Jenkins LJ (dissenting).

3 *Sharpe v Crispin* (1869) LR 1 P & D 611 at 619 (person of weak intellect).

4 *Gulbenkian v Gulbenkian* [1937] 4 All ER 618 at 627.

5 *Re Grove, Vaucher v Treasury Solicitor* (1888) 40 ChD 216, CA.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(iv) Change of Domicile/47. Direct and secondary evidence of intention.

47. Direct and secondary evidence of intention.

Direct evidence of intention is often not available, but a person whose domicile is in question may himself give evidence of his intentions, present or past. Evidence of this nature is to be accepted with considerable reserve, even if there is no suspicion that the witness is being untruthful¹.

Expressions of intention, written or oral, may be given in evidence², but such evidence must be carefully weighed in connection with the circumstances in which it occurred, and even if the expressions are clear and consistent they cannot prevail against a course of conduct leading to an opposite inference³.

1 *Bell v Kennedy* (1868) LR 1 Sc & Div 307 at 313, HL; *Udny v Udny* (1869) LR 1 Sc & Div 441 at 444, HL; *Maxwell v Maclure* (1860) 2 LT 65; *Wilson v Wilson* (1872) LR 2 P & D 435 at 444; *D'Etchegoyen v D'Etchegoyen* (1888) 13 PD 132; *Re Craignish, Craignish v Hewitt* [1892] 3 Ch 180 at 190, CA; *Eleftheriou v Eleftheriou* [1964] CLY 511; *Qureshi v Qureshi* [1972] Fam 173 at 192, [1971] 1 All ER 325 at 339.

2 Hearsay evidence as to domicile may be admissible under the Civil Evidence Act 1995 s 1: see CIVIL PROCEDURE VOL 11 (2009) PARA 808 et seq. See also *Bryce v Bryce* [1933] P 83; *Scappaticci v A-G* [1955] P 47, [1955] 1 All ER 193n.

3 *Ross v Ellison (or Ross)* [1930] AC 1, HL; *Munro v Munro* (1840) 7 Cl & Fin 842, HL; *Anderson v Laneville* (1854) 9 Moo PCC 325; *Hoskins v Matthews* (1856) 8 De GM & G 13 at 30; *Hodgson v De Beauchesne* (1858) 12 Moo PCC 285 at 325; *Re Steer* (1858) 3 H & N 594; *Drevon v Drevon* (1864) 34 LJCh 129; *Doucet v Geoghegan* (1878) 9 ChD 441 at 455, CA; *Re Annesley, Davidson v Annesley* [1926] Ch 692; *A-G v Yule and Mercantile Bank of India* (1931) 145 LT 9, CA; *Abraham v A-G* [1934] P 17; *Re Liddell-Grainger's Will Trusts, Dormer v Liddell-Grainger* [1936] 3 All ER 173; *Re Sillar, Hurley v Wimbush and Bavington* [1956] IR 344; *Re Fuld's Estate (No 3), Hartley v Fuld* [1968] P 675 at 692; *Re Flynn, Flynn v Flynn* [1968] 1 All ER 49 at 60, [1968] 1 WLR 103 at 117. See also *Tennekoon, Registration of Indian and Pakistani Residents Comr v Duraisamy* [1958] AC 354, [1958] 2 All ER 479, PC.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(iv) Change of Domicile/48. Residence as evidence.

48. Residence as evidence.

Residence in a country, especially if it is continued for a long period, is evidence of an intention to remain there; in the absence of other evidence, residence alone may support the inference that a domicile has been acquired. Such cases will be rare, however, and, while residence is always material evidence, it is seldom decisive, for slight circumstances may serve to show the absence of a settled intention¹.

¹ *Bruce v Bruce* (1790) 2 Bos & P 229n, HL; *Bempde v Johnstone* (1796) 3 Ves 198; *Stanley v Bernes* (1830) 3 Hag Ecc 373; *Hodgson v De Beauchesne* (1858) 12 Moo PCC 285; *King v Foxwell* (1876) 3 ChD 518; *Doucet v Geoghegan* (1878) 9 ChD 441, CA; *Re Patience, Patience v Main* (1885) 29 ChD 976; *Re Grove, Vaucher v Treasury Solicitor* (1888) 40 ChD 216, CA; *Winans v A-G* [1904] AC 287, HL; *Bowie (or Ramsay) v Liverpool Royal Infirmary* [1930] AC 588, HL; *Gulbenkian v Gulbenkian* [1937] 4 All ER 618.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(iv) Change of Domicile/49. Residence as a matter of duty.

49. Residence as a matter of duty.

A person may reside in a country as a result of his being under some duty, public or private. Examples include diplomats and other overseas servants of the Crown, members of the armed forces and employees of international organisations or of commercial undertakings with interests in several countries. Such residence is likely to be temporary and may be in some measure involuntary. If it is not accompanied by any intention to make a permanent home in the country of residence, the person concerned will retain his former domicile¹.

Such a person may be held to have acquired a domicile of choice in the country of residence if the appropriate intention can be derived from all the circumstances². Cogent evidence of such intention is required³. The fact that a person holds public office in the service of the country of residence, an alien country, is material⁴.

1 *Maltass v Maltass* (1844) 1 Rob Eccl 67; *Gout v Zimmermann* (1847) 5 Notes of Cases 440 (diplomats); *Re Mitchell, ex p Cunningham* (1884) 13 QBD 418, CA; *A-G v Napier* (1851) 6 Exch 217; *Brown v Smith* (1852) 21 LJCh 356; *Yelverton v Yelverton* (1859) 1 Sw & Tr 574; *Firebrace v Firebrace* (1878) 4 PD 63; *Re Macreight, Paxton v Macreight* (1885) 30 ChD 165; *Cruickshanks v Cruickshanks* [1957] 1 All ER 889, [1957] 1 WLR 564 (members of armed forces); *A-G v Pottinger* (1861) 30 LJEx 284 (colonial governor); *A-G v Lady Rowe* (1862) 1 H & C 31 (colonial judge).

2 *Heath v Samson* (1851) 14 Beav 441; *A-G v Kent* (1862) 1 H & C 12 (diplomats); *Re Smith's Goods* (1850) 2 Rob Eccl 332 (colonial officer); *Donaldson (or Nichols) v Donaldson* [1949] P 363; *Stone v Stone* [1959] 1 All ER 194, [1958] 1 WLR 1287 (members of armed forces). The holder of a public office with duties in England is not thereby prevented from acquiring a domicile abroad: *Hamilton v Dallas* (1875) 1 ChD 257 (peer of Parliament); *Horn v Horn* (1929) 142 LT 93 (army reservist). Appointment to an overseas post under the Crown will not by itself cause the revival of an English domicile of origin: *Sharpe v Crispin* (1869) LR 1 P & D 611; *Re Baron De Almeda, Sourdis v Keyser* (1902) 18 TLR 414, CA. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 *Cruickshanks v Cruickshanks* [1957] 1 All ER 889 at 892, [1957] 1 WLR 564 at 568.

4 *Re Mitchell, ex p Cunningham* (1884) 13 QBD 418 at 423, CA; *Urquhart v Butterfield* (1887) 37 ChD 357 at 382, CA.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(iv) Change of Domicile/50. Persons liable to deportation.

50. Persons liable to deportation.

A person may be held to have acquired a domicile of choice in a country despite provisions in the local law as to aliens or immigration making his right to remain there precarious. The court will consider whether, despite the possibility of deportation, the individual has decided to make that country his permanent home, so far as it is within his power¹. Similarly, a domicile once acquired will not necessarily be affected by the making of a deportation order², and may survive actual deportation if the individual intends to return³.

1 *Boldrini v Boldrini and Martini* [1932] P 9, CA; *May v May and Lehmann* [1943] 2 All ER 146; *Zanelli v Zanelli* (1948) 64 TLR 556, CA; *Szechter (otherwise Karsov) v Szechter* [1971] P 286 at 294, [1970] 3 All ER 905 at 912. See, however, para 42 text and note 7 ante (illegal residence insufficient to establish domicile).

2 *Cruh v Cruh* [1945] 2 All ER 545.

3 *Thiele v Thiele* (1920) 150 LT Jo 387; *Cruh v Cruh* [1945] 2 All ER 545.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(iv) Change of Domicile/51. Residence by force of circumstances.

51. Residence by force of circumstances.

Where a person resides in a country as a result of the pressure of circumstances, his residence will be in some measure involuntary. In such a case, where there is no intention to make a permanent home in the country of residence, the previous domicile will remain unchanged. The greater the pressure, the more likely it is that the individual will retain his earlier domicile¹.

Prisoners and persons under physical restraint fall into this class of persons. Political exiles and refugees are in a similar position, as are those escaping prosecution or the claims of their creditors. In such cases, strong evidence is required to show that a domicile has been acquired in the country of residence².

1 See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 127-132.

2 *De Bonneval v De Bonneval* (1838) 1 Curt 856; *Charitable Donations Comrs v Devereux* (1842) 13 Sim 14 (refugees from the French revolution); *Pitt v Pitt* (1864) 4 Macq 627, HL; *Udny v Udny* (1869) LR 1 Sc & Div 441, HL; *Briggs v Briggs* (1880) 5 PD 163 (avoiding creditors); *Re Martin, Loustalan v Loustalan* [1900] P 211, CA (escaping criminal prosecution); *May v May and Lehmann* [1943] 2 All ER 146; *Re Lloyd Evans, National Provincial Bank v Evans* [1947] Ch 695 (refugees from German invaders).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(iv) Change of Domicile/52. Invalids.

52. Invalids.

The acquisition of a domicile of choice is not necessarily prevented by the fact that residence has been established owing to reasons of health; but the state of health may be evidence to show that the intention to settle either does or does not exist. The question in these cases is not whether a person would prefer in different circumstances to live elsewhere, but what is his present intention with regard to his actual residence. If he has, however reluctantly, formed a fixed determination to make his home in the country of residence, a domicile is acquired¹; but if he has not, then, even though he may expect to die there, no domicile is acquired².

¹ *Hoskins v Matthews* (1856) 8 De GM & G 13 (court evenly divided); *Aitchison v Dixon* (1870) LR 10 Eq 589 (where a domicile was acquired).

² *A-G v Fitzgerald* (1856) 3 Drew 610; *The Lauderdale Peerage* (1885) 10 App Cas 692 at 740, HL; *Gillis v Gillis* (1874) 8 IR Eq 597; *Re James, James v James* (1908) 98 LT 438; *Johnstone v Beattie* (1843) 10 Cl & Fin 42 at 139, HL.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(iv) Change of Domicile/53. Other evidence.

53. Other evidence.

Among the circumstances which have been regarded as throwing light on the question of intention are the following: (1) change of nationality¹, of religion², or of name³; (2) marriage to a person who is a native of the country of residence⁴; (3) the education, marriage or settlement in life of children⁵; (4) the purchase, sale or ownership of land⁶, especially of family estates⁷ or graves⁸; (5) attitude to the exercise of political rights in the country of residence⁹; (6) the form and contents of wills or other documents¹⁰; and (7) the degree of social integration¹¹. All these factors take colour from their context, and none can be conclusive¹².

1 *Stanley v Bernes* (1830) 3 Hag Ecc 373; *D'Etchegoyen v D'Etchegoyen* (1888) 13 PD 132; *Wahl v A-G* (1932) 147 LT 382, HL; *Qureshi v Qureshi* [1972] Fam 173, [1971] 1 All ER 325; *Re Fuld's Estate (No 3)*, *Hartley v Fuld* [1968] P 675, [1965] 3 All ER 776; *Re Flynn, Flynn v Flynn* [1968] 1 All ER 49, [1968] 1 WLR 103.

2 *Stanley v Bernes* (1830) 3 Hag Ecc 373.

3 *Drevon v Drevon* (1864) 34 LJCh 129 (spelling of Christian name); *Re Martin, Loustalan v Loustalan* [1900] P 211, CA (surname).

4 *Drevon v Drevon* (1864) 34 LJCh 129; *Doucet v Geoghegan* (1878) 9 ChD 441, CA; cf *Re Bethell, Bethell v Hildyard* (1888) 38 ChD 220; *Cramer v Cramer* [1987] 1 FLR 116, CA.

5 *Stevenson v Masson* (1873) LR 17 Eq 78; *President of United States of America v Drummond* (1864) 33 Beav 449.

6 Some sort of property transaction occurs in almost every case. Features of special importance may be the building of a house to a special personal design (*Re Flynn, Flynn v Flynn* [1968] 1 All ER 49, [1968] 1 WLR 103); the careful management and development of property (*Moorhouse v Lord* (1863) 10 HL Cas 272 at 288); or a preference for short leases of furnished houses or hotels (*Winans v A-G* [1904] AC 287, HL). Cf *Qureshi v Qureshi* [1972] Fam 173, [1971] 1 All ER 325 (no account taken of property purchased in England).

7 *Aitchison v Dixon* (1870) LR 10 Eq 589 (use of Scottish territorial distinctions); cf *Re Craignish, Craignish v Hewitt* [1892] 3 Ch 180 at 186.

8 *Stevenson v Masson* (1873) LR 17 Eq 78; *Re Patience, Patience v Main* (1885) 29 ChD 976 at 984; cf *Haldane v Eckford* (1869) LR 8 Eq 631.

9 *IRC v Bullock* [1976] 3 All ER 353, [1976] 1 WLR 1178, CA.

10 *Re Craignish, Craignish v Hewitt* [1892] 3 Ch 180, CA; *Drevon v Drevon* (1864) 34 LJCh 129; *Doucet v Geoghegan* (1878) 9 ChD 441, CA; *Ramsay-Fairfax (otherwise Scott-Gibson) v Ramsay-Fairfax* [1956] P 115, [1955] 2 All ER 709 (affd [1956] P 115 at 126, [1955] 3 All ER 695, CA); *Qureshi v Qureshi* [1972] Fam 173, [1971] 1 All ER 325. As to statements in eg wills and documents as to the maker's domicile see para 47 ante.

11 *Re Craignish, Craignish v Hewitt* [1892] 3 Ch 180, CA (membership of clubs and attendance at church); *Irvin v Irvin* [2001] 1 FLR 178 (language learnt and newspapers read).

12 See *Drevon v Drevon* (1864) 34 LJCh 129; and para 46 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(v) Domicile of Dependence/54. Married women.

(v) Domicile of Dependence

54. Married women.

The domicile of a married woman, rather than being the same as her husband's by virtue only of marriage, must now be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile¹.

In considering the domicile of a married woman as at any date before 1 January 1974, it is necessary to apply the earlier rule, which stated that she acquired her husband's domicile on marriage and that during the existence of the marriage her domicile followed that of her husband². This rule applied despite the existence of a decree of judicial separation³, or of a decree of divorce not recognised as valid in England⁴. On the dissolution of the marriage by her husband's death, or by divorce, the wife became free to change her domicile⁵, but until she did so she retained the domicile of the husband at the time the marriage was dissolved⁶. A void marriage had no effect upon a woman's domicile; but in the case of a voidable marriage she took her husband's domicile until the marriage was annulled⁷. A married woman who had her husband's domicile under these rules immediately before 1 January 1974 retained that domicile (as a domicile of choice if it was not also her domicile of origin) after that date until her domicile was changed under the rules governing changes in the domicile of independent persons⁸.

1 Domicile and Matrimonial Proceedings Act 1973 s 1(1). Thus a married woman is not incapacitated by the fact of her marriage from acquiring a domicile of choice, and she may change her domicile independently of her husband. But see the text and notes 2-8 *infra* for the position where a married woman's domicile has not been changed since before 1 January 1974 (ie the date when s 1 came into force: see s 17(5)).

2 Ibid s 1(2). The woman is treated as retaining that domicile (as a domicile of choice, if it does not coincide with her domicile of origin) unless and until it is changed by acquisition of a new domicile or by the revival of another domicile: s 1(2). Section 1 does not have retrospective effect and hence makes new provision for determining the domicile of a married woman as at any time only after its coming into force. The Domicile and Matrimonial Proceedings Act 1973 came into force on 1 January 1974: see s 17(5). See *Re Daly's Settlement* (1858) 25 Beav 456; *Pitt v Pitt* (1864) 4 Macq 627 at 647, HL (and cf that case at 640); *Firebrace v Firebrace* (1878) 4 PD 63 at 67; *Harvey v Farnie* (1882) 8 App Cas 43, HL; *Lord Advocate v Jaffrey* [1921] 1 AC 146, HL; *H v H* [1928] P 206 at 212 (subsequent proceedings sub nom *Horn v Horn* (1929) 142 LT 93); *Herd v Herd* [1936] P 205, [1936] 2 All ER 1516; *Re Scullard, Smith v Brock* [1957] Ch 107, [1956] 3 All ER 898; *Garthwaite v Garthwaite* [1964] P 356, [1964] 2 All ER 233, CA.

3 *A-G for Alberta v Cook* [1926] AC 444, PC; *Garthwaite v Garthwaite* [1964] P 356 at 379, [1964] 2 All ER 233 at 236, CA; *H v H* [1928] P 206. See also *Anghinelli v Anghinelli* [1918] P 247, CA.

4 *Garthwaite v Garthwaite* [1964] P 356, [1964] 2 All ER 233, CA. As to the meanings of 'England', 'English' and 'English law' see para 4 *ante*.

5 Ie assuming she was not otherwise dependent. For the effect of her decision on the domicile of her children see para 55 *post*.

6 *Re Wallach, Weinschenk v Treasury Solicitor* [1950] 1 All ER 199; *Re Scullard, Smith v Brock* [1957] Ch 107, [1956] 3 All ER 898; and see *Re Cooke's Trusts* (1887) 56 LJCh 637; *Re Raffanel's Goods* (1863) 3 Sw & Tr 49.

7 *De Reneville v De Reneville* [1948] P 100, [1948] 1 All ER 56, CA.

8 See the Domicile and Matrimonial Proceedings Act 1973 s 1(2); *IRC v Duchess of Portland* [1982] Ch 314, [1982] 1 All ER 784; *Plummer v IRC* [1988] 1 All ER 97, [1988] 1 WLR 292.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(v) Domicile of Dependence/55. Children.

55. Children.

The law attributes to everyone at birth a domicile of origin¹. However, in the case of children, this may be replaced by a domicile of dependence until the child first becomes capable of having an independent domicile. A child first becomes capable of having an independent domicile when he attains the age of 16 or marries under that age². Before 1 January 1974, he could not have an independent domicile while he remained a minor; this rule still applies in considering the domicile of any person as at any date before 1 January 1974³. The domicile of a dependent child (that is, a child who cannot have an independent domicile) may in some cases be changed by the act of the person on whom he is dependent⁴.

In the case of a legitimate dependent child whose parents are living together, his domicile follows any change in the domicile of his father⁵. It would seem that the same rule applies to legitimated and to adopted children, who are treated as if they had been born in wedlock to their adoptive parents⁶. After the father's death, the child's domicile will generally follow a change in the mother's domicile⁷. The exercise by the mother of her power to change the domicile of the child is only effectual where the change is for the benefit of the child⁸; and the power cannot be exercised where the child is a ward of court residing out of the jurisdiction by permission⁹. The power is not lost by the mother's remarriage¹⁰.

Where the parents of a legitimate child are living apart, the child's domicile will be that of his mother if he has his home with his mother and has no home with his father, or if, having once acquired his mother's domicile under this rule, he has not since had a home with his father¹¹. Where a dependent child has his mother's domicile under these rules and she then dies, the child retains her last domicile until he has a home with his father (in which case he takes his father's domicile) or acquires an independent domicile of choice¹². These rules also apply to adopted children¹³, but do not affect any rule of law by which a child's domicile is regarded as being, by dependence, that of his mother¹⁴.

The mother of an illegitimate child has the same power of changing his domicile when she changes her own as does the widowed mother of a legitimate child¹⁵.

A guardian probably has no power to change the domicile of his ward¹⁶.

On becoming capable of acquiring an independent domicile, the child retains his domicile of dependence, but may abandon it and acquire a domicile of choice at any time¹⁷.

1 See para 39 ante.

2 Domicile and Matrimonial Proceedings Act 1973 s 3(1). For the exceptional case in which a dependent child of separated parents changes his home and thereby changes his domicile see the text to notes 11-12 infra.

3 Ibid s 3(1). The date referred to in the text is the date on which the Domicile and Matrimonial Proceedings Act 1973 came into force: see s 17(5).

4 *Somerville v Lord Somerville* (1801) 5 Ves 750 at 787; *Forbes v Forbes* (1854) Kay 341 at 353; *Re Macreight*, *Paxton v Macreight* (1885) 30 ChD 165.

5 *Re Patten's Goods* (1860) 6 Jur NS 151; *Sharpe v Crispin* (1869) LR 1 P & D 611; *Firebrace v Firebrace* (1878) 4 PD 63; *D'Etchegoyen v D'Etchegoyen* (1888) 13 PD 132; *Gulbenkian v Gulbenkian* [1937] 4 All ER 618; *Henderson v Henderson* [1967] P 77, [1965] 1 All ER 179. As to the domicile of origin of a legitimate child see para 40 ante.

6 See the Adoption Act 1976 s 39(1); and para 40 ante.

7 *Pottinger v Wightman* (1817) 3 Mer 67; *Johnstone v Beattie* (1843) 10 Cl & Fin 42 at 66, 138; *Re Beaumont* [1893] 3 Ch 490; *Hope v Hope* [1968] NI 1 at 5. Where both parents of a legitimate child have died (or where the mother of an illegitimate child has died), and the child is not old enough to acquire an independent domicile, it is likely that the child's domicile cannot be changed, although there is no English authority on this point: see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 141.

8 *Re Beaumont* [1893] 3 Ch 490 at 496-497; applied in *Re G* [1966] NZLR 1028, NZ SC.

9 *Johnstone v Beattie* (1843) 10 Cl & Fin 42 at 139.

10 *Re Beaumont* [1893] 3 Ch 490. See *Crumpton's Judicial Factor v Finch-Noyes* 1918 SC 378.

11 Domicile and Matrimonial Proceedings Act 1973 s 4(1), (2). These provisions do not apply so as to affect the domicile of any person as at a date before 1 January 1974.

12 Ibid s 4(3).

13 See the Adoption Act 1976 s 39(1); and para 40 ante.

14 Domicile and Matrimonial Proceedings Act 1973 s 4(4). This effectively applies to illegitimate children (as to which see para 40 ante).

15 It is submitted that the grounds on which Stirling J based his decision in *Re Beaumont* [1893] 3 Ch 490, whereby a widow's new domicile of dependence, acquired upon remarriage, did not affect one child left behind in the former country of domicile, apply with equal force to the case of an illegitimate child. If such a child is legitimated, his domicile would appear to follow that of his father.

16 See *Pottinger v Wightman* (1817) 3 Mer 67; *Douglas v Douglas* (1871) LR 12 Eq 617 at 625; and Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 140-141.

17 *Henderson v Henderson* [1967] P 77, [1965] 1 All ER 179; *Harrison v Harrison* [1953] 1 WLR 865.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(2) DETERMINATION OF DOMICILE OF ORIGIN AND OF CHOICE/(v) Domicile of Dependence/56. Persons suffering from mental disorder.

56. Persons suffering from mental disorder.

The domicile of a person suffering from a mental disorder cannot be changed, either by his own act or by the act of the person having his custody¹. However, it is an open question what types of mental disorder attract this rule². There is a possible exception where the mental incapacity begins during childhood, when the child is incapable of an independent domicile, and is not succeeded by adult capacity; in these circumstances the domicile of a mentally disordered person continues to be governed by the rules applying to dependent children³.

1 *Hepburn v Skirving* (1861) 9 WR 764; *Sharpe v Crispin* (1869) LR 1 P & D 611; *Urquhart v Butterfield* (1887) 37 ChD 357 at 383, CA. Cf *Bempde v Johnstone* (1796) 3 Ves 198 at 201. For the meaning of 'mental disorder' in the Mental Health Act 1983 see s 1(2); and MENTAL HEALTH vol 30(2) (Reissue) para 402.

2 See *Sharpe v Crispin* (1869) LR 1 P & D 611 at 618 ('ability to think and act for himself in the matter of domicile otherwise than as a minor child').

3 *Sharpe v Crispin* (1869) LR 1 P & D 611. Here, however, the intentions of the person concerned were also considered.

UPDATE

56 Persons suffering from mental disorder

TEXT AND NOTES--The Mental Capacity Act 2005 Sch 3 makes provision in relation to persons who cannot protect their interests, governing which jurisdiction should apply when a national of one country is in another state: see Mental Capacity Act 2005 Sch 3; and PARA 14A.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(3) RESIDENCE/57. Residence in general.

(3) RESIDENCE

57. Residence in general.

The term 'residence' bears varying meanings according to its context¹, and great caution must be exercised before authorities on the meaning of 'residence' in such contexts as bankruptcy² and taxation³, are applied in other contexts. In particular, it is clear that some degree of permanence is required for the acquisition of residence in some contexts⁴, but not, or to a lesser extent, in others⁵.

Generally, 'residence' means physical presence other than casually or as a traveller⁶. In considering whether residence is established the court considers a man's whole environment, especially in relation to his wife and family, and not merely his physical situation⁷. In some cases, a person may be resident in England despite a temporary absence⁸; and he may be held to be resident in two or more countries⁹. It is possible to be resident in a country without owning or enjoying exclusive possession of any premises there¹⁰.

1 See eg *Foreman v Beagley* [1969] 3 All ER 838 at 841, [1969] 1 WLR 1387 at 1392, CA.

2 See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 125.

3 See *Levene v IRC* [1928] AC 217, HL; *IRC v Lysaght* [1928] AC 234, HL; and INCOME TAXATION vol 23(2) (Reissue) para 1260. In relation to the old poor law provisions see eg *R v Norwood Overseers* (1867) LR 2 QB 457, applying the maxim *ubi uxor ibi domus* (a man's home is where his wife is).

4 See eg *Levene v IRC* [1928] AC 217 at 222, HL (taxation); *Fox v Stirk and Bristol Electoral Registration Officer* [1970] 2 QB 463, [1970] 3 All ER 7, CA (qualifications for entry on register of electors); *Brokelmann v Barr* [1971] 2 QB 602, [1971] 3 All ER 29, DC (relief from customs duty).

5 Eg *Bell v Kennedy* (1868) LR 1 Sc & Div 307 at 319, HL; *Fasbender v A-G* [1922] 2 Ch 850 at 857-858, CA; *Stone v Stone* [1959] 1 All ER 194, [1958] 1 WLR 1287 (acquisition of domicile of choice); *Armytage v Armytage* [1898] P 178; *Matalon v Matalon* [1952] P 233, [1952] 1 All ER 1025, CA; *Sinclair v Sinclair* [1968] P 189, [1967] 3 All ER 882, CA (judicial separation).

6 *Sinclair v Sinclair* [1968] P 189, [1967] 3 All ER 882, CA; *Manning v Manning* (1871) LR 2 P & D 223; *Armytage v Armytage* [1898] P 178; *Matalon v Matalon* [1952] P 233, [1952] 1 All ER 1025, CA (all cases of judicial separation).

7 *Sinclair v Sinclair* [1968] P 189 at 231-232, [1967] 3 All ER 882 at 898, CA.

8 *Sinclair v Sinclair* [1968] P 189 at 228-231, [1967] 3 All ER 882 at 896-898, CA; *Raeburn v Raeburn* (1928) 44 TLR 384; *Dasent v Dasent* (1850) 1 Rob Eccl 800 at 803 per Dr Lushington (judicial separation). See also *Fox v Stirk and Bristol Electoral Registration Officer* [1970] 2 QB 463 at 475, [1970] 3 All ER 7 at 12, CA (qualification for entry on register of electors). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

9 *Sinclair v Sinclair* [1968] P 189 at 232, [1967] 3 All ER 882 at 899, CA; *Fox v Stirk and Bristol Electoral Registration Officer* [1970] 2 QB 463 at 475, [1970] 3 All ER 7 at 11, CA. For taxation purposes, residence may be 'multiple and manifold': *IRC v Lysaght* [1928] AC 234 at 245, HL.

10 See eg *Levene v IRC* [1928] AC 217, HL; *Matalon v Matalon* [1952] P 233, [1952] 1 All ER 1025, CA; *Stone v Stone* [1959] 1 All ER 194, [1958] 1 WLR 1287.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(3) RESIDENCE/58. Ordinary residence.

58. Ordinary residence.

'Ordinary residence' is residence adopted voluntarily and for settled purposes as part of the regular order of life for the time being, as opposed to such residence as is casual, temporary or unusual¹. It is possible, in some contexts, for a person to be ordinarily resident in two or more places², but this would seem to be impossible in cases where ordinary residence is a basis for the court's jurisdiction³.

Different views have been expressed on the question whether there is any difference between 'residence' and 'ordinary residence'⁴. It is clear that ordinary residence, like residence, can be changed in a day⁵.

1 *Levene v IRC* [1928] AC 217, HL; *IRC v Lysaght* [1928] AC 234, HL; *Macrae v Macrae* [1949] P 397, [1949] 2 All ER 34, CA; *Hopkins v Hopkins* [1951] P 116, [1950] 2 All ER 1035; *Stransky v Stransky* [1954] P 428, [1954] 2 All ER 536; *Lewis v Lewis* [1956] 1 All ER 375, [1956] 1 WLR 200; *Shah v Barnet London Borough Council* [1983] 2 AC 309, [1983] 1 All ER 226, HL (the words have a natural meaning). The fact that a person keeps a home available for immediate occupation in a country is evidence of ordinary residence there (*Stransky v Stransky* supra; *Lewis v Lewis* supra); but a home in this sense is not essential. However, where a house is kept for a duration which was limited in time at the point at which it commenced, this may not be enough to establish ordinary residence for tax purposes: *Goodwin v Curtis* [1998] STC 475. A person who makes repeated attempts to enter the country but who is denied permission to enter cannot claim to be ordinarily resident: *R v Secretary of State for the Home Department, ex p Butta* [1994] Imm AR 197.

2 *Pittar v Richardson* (1917) 87 LJB 59 at 61, DC (liability for military service).

3 See eg the Carriage by Air Act 1961 s 1(1), Sch 1 art 28(1); and CARRIAGE AND CARRIERS vol 7 (2008) PARA 162.

4 For the view that there is a difference see *Levene v IRC* [1928] AC 217 at 232, HL; *IRC v Lysaght* [1928] AC 234 at 243, 248, HL; *Stransky v Stransky* [1954] P 428 at 437, [1954] 2 All ER 536 at 541. For the contrary view see *Levene v IRC* supra at 225; *Hopkins v Hopkins* [1951] P 116 at 121-122, [1950] 2 All ER 1035 at 1038-1039.

As to possible differences between 'ordinary residence' and 'habitual residence' see para 59 note 9 post.

5 *Macrae v Macrae* [1949] P 397 at 403, [1949] 2 All ER 34 at 36, CA.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(3) RESIDENCE/59. Habitual residence.

59. Habitual residence.

'Habitual residence' is a concept that appears commonly in the law of continental European countries¹, and in international conventions². It is used also in European Union legislation³. The concept has been employed in English statutes, mostly (but not restricted to) those which implement international conventions⁴.

In English law, habitual residence has been defined as a regular physical presence, enduring for some time⁵. The issue of where somebody is habitually resident is primarily a matter of fact, to be determined according to all the circumstances of each individual case⁶, and must be construed according to English law rather than any foreign law under which the acquisition of habitual residence is being alleged⁷. The words bear their ordinary and natural meaning in all cases unless statute expressly provides otherwise⁸. In most contexts there will be no real distinction between 'habitual residence' and 'ordinary residence'⁹.

In contradistinction to the concept of domicile of origin, it is possible for a person to have no habitual residence in certain circumstances, so that there is a gap between losing a habitual residence and gaining a new one¹⁰. It is possible also to be habitually resident in two places, at least for certain purposes¹¹, and habitual residence may continue during periods of temporary absence¹².

1 For a discussion of the development of domicile, residence and nationality as connecting factors in private international law see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 152 et seq.

2 See eg the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33) (set out in the Child Abduction and Custody Act 1985 Sch 1); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 799.

3 'Habitual residence' in this sense is the main connecting factor used to allocate jurisdiction in EC Council Regulation 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (OJ L160, 30.6.2000, p 19) (the 'Brussels II' Regulation), which applies to matrimonial matters and matters of parental responsibility for children of both spouses in the European Union: see para 242 post. It is used also as a connecting factor to determine choice of law in the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L226, 9.10.80, p 1) arts 4, 5, 8: see para 352 et seq post. In European law, 'habitual residence' is a concept to be distinguished from the term 'habitual residence' as it is used in English law: see Case C-90/97 *Swaddling v Administration Officer* [1999] ECR I-1075, ECJ, where a list of factors is given which can determine where a person habitually resides according to European law. The concept appears to include what English law understands to be ordinary and habitual residence as well as mere residence.

4 See eg note 2 supra. See also the Family Law Act 1986 s 41 (as amended), where special provision is made so that the habitual residence of a child is unaffected for one year by the unlawful removal of the child from the territory of his habitual residence; and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 843. This provision has been cited in support of the argument that settled intention is not an essential element in establishing habitual residence: see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 151; and para 61 note 1 post. The concept of habitual residence is also used commonly to allocate jurisdiction in matters relating to matrimonial causes and child custody: see eg the Family Law Act 1986 s 19(2)(b); the Domicile and Matrimonial Proceedings Act 1973 s 5(3)(b); and the Child Abduction and Custody Act 1985, Sch 1. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

5 *Cruse v Chittum (formerly Cruse)* [1974] 2 All ER 940 at 942. See also *Re A (Abduction: Habitual Residence)* [1996] 1 FLR 1, [1996] 1 All ER 24, [1996] 1 WLR 25; *Re M (Abduction: Habitual Residence)* [1996] 1 FLR 887; *D v D (Custody: Jurisdiction)* [1996] 1 FLR 574; *Re M (Care Orders: Jurisdiction)* [1997] 1 FLR 456; *M v M (Abduction: England and Scotland)* [1997] 2 FLR 263; *Nessa v Chief Adjudication Officer* [1999] 4 All ER 677, [1999] 1 WLR 1937, HL; *Re A (Abduction: Habitual Residence)* [1998] 1 FLR 497; *Re S (Custody: Habitual*

Residence) [1998] 1 FLR 122. For the need to weigh with care statements as to habitual residence made by interested parties see *F v S (Wardship: Jurisdiction)* [1993] 2 FLR 686, CA.

6 *Re J (Abduction: Custody Rights)* [1990] 2 AC 562, [1990] 2 All ER 961, HL; *Re M (Minors) (Residence Order: Jurisdiction)* [1993] 1 FLR 495, CA; *Re M (A Minor) (Habitual Residence)* (1996) Times, 3 January, CA; *Nessa v Chief Adjudication Officer* [1999] 4 All ER 677, [1999] 1 WLR 1937, HL.

7 *Re A (Abduction: Habitual Residence)* [1996] 1 All ER 24, [1996] 1 WLR 25; *Re B (Abduction: Habitual Residence)* [1994] 2 FLR 915. As to determining the domicile of an individual by reference to English law alone see para 37 ante.

8 *Shah v Barnet London Borough Council* [1983] 2 AC 309, [1983] 1 All ER 226, HL (in relation to ordinary residence); *Re J (Abduction: Custody Rights)* [1990] 2 AC 562, [1990] 2 All ER 961, HL (habitual residence); *Nessa v Chief Adjudication Officer* [1999] 4 All ER 677, [1999] 1 WLR 1937, HL.

9 *Shah v Barnet London Borough Council* [1983] 2 AC 309, [1983] 1 All ER 226, HL; *Kapur v Kapur* [1984] FLR 920; *V v B (Abduction)* [1991] 1 FLR 266; *M v M (Abduction: England and Scotland)* [1997] 2 FLR 263 at 273 (no practical distinction in that both concepts require voluntary and settled residence, although habitual residence may be a more 'fashionable' concept than the 'traditional' one of ordinary residence); *Nessa v Chief Adjudication Officer* [1999] 4 All ER 677 at 681, [1999] 1 WLR 1937 at 1941, HL, per Lord Slynn of Hadley (although not synonymous, the concepts share 'a common core of meaning'); *I v I (Divorce: Habitual Residence)* [2001] 1 FLR 913, [2001] Fam Law 342. Cf *Cruse v Chittum (formerly Cruse)* [1974] 2 All ER 940 at 943 (ordinary residence is different from habitual residence in that the latter is something more than the former).

10 *Re J (Abduction: Custody Rights)* [1990] 2 AC 562 at 578-579, sub nom *C v S (Minor: Abduction: Illegitimate Child)* [1990] 2 All ER 961 at 965, HL, per Lord Brandon of Oakbrook (habitual residence may be lost immediately if a person leaves country A with a settled intention not to return to it but to take up long-term residence in country B instead); *Re M (Minors) (Residence Order: Jurisdiction)* [1993] 1 FLR 495, CA; *Re K (Abduction: Consent: Forum Conveniens)* [1995] 2 FLR 211; *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FCR 385, [2001] 1 FLR 951.

However, for the purposes of making particular legislation effective (and for founding jurisdiction), it may be necessary to eliminate any gaps in a person's habitual residence: *Nessa v Chief Adjudication Officer* [1999] 4 All ER 677 at 682, [1999] 1 WLR 1937 at 1942, HL, per Lord Slynn of Hadley (social security legislation). As to loss of domicile of choice (and the revival of domicile of origin to fill any gap) see para 44 note 6 ante.

11 Cf para 58 text to notes 2-3 ante (ordinary residence). See also *Shah v Barnet London Borough Council* [1983] 2 AC 309, [1983] 1 All ER 226, HL; *Re V (Abduction: Habitual Residence)* [1995] 2 FLR 992 (concurrent habitual residence in two countries impossible in the context of the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33)); *I v I (Divorce: Habitual Residence)* [2001] 1 FLR 913, [2001] Fam Law 342 ('settled law' that a person could have two habitual or ordinary residences, and that they could exist at the same time); *Ikimi v Ikimi* [2001] EWCA Civ 873, [2001] 2 FCR 385 (matrimonial homes maintained in two countries at the same time; the couple had two habitual residences).

12 *Oundjian v Oundjian* (1979) 1 FLR 198; *Re M (Minors) (Residence Order: Jurisdiction)* [1993] 1 FLR 495, CA.

UPDATE

59 Habitual residence

NOTE 11--See *Re A (Abduction: Habitual Residence: Consent)* [2005] EWHC 2998 (Fam), [2006] 2 FLR 1.

NOTE 12--See also *Munro v Munro* [2007] EWHC 3315 (Fam), [2008] 3 FCR 401.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(3) RESIDENCE/60. Habitual residence of children.

60. Habitual residence of children.

Habitual residence cannot be acquired through dependence¹. Under English law, the habitual residence of a child under 16 is generally determined by the parent or parents who bear parental responsibility². Where the child and both parents are living together, the child shares the habitual residence of the parents and this cannot be changed without the consent of both parents or by a court order³. The habitual residence of a child is not changed where both parents and the child move to a different country but only one parent acquires a new habitual residence⁴. Where parents separate, the child's habitual residence will follow that of the primary carer with whom he resides⁵. However, a person without parental rights cannot change a child's habitual residence simply by taking him to a different country⁶. The habitual residence of a child may be changed without there being a corresponding change in the parent's habitual residence⁷, but a strong burden is placed upon the parent to establish such a change⁸.

1 *N v N (Abduction: Habitual Residence)* [2000] 3 FCR 84, [2000] 2 FLR 899; *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FCR 385, [2001] 1 FLR 951.

2 See the Family Law Act 1986 s 41 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 843. As to the use of the term 'habitual residence' in the context of international child abduction see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 806. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 *Re B (Abduction) (No 2)* [1993] 1 FLR 993; *D v D (Custody: Jurisdiction)* [1996] 1 FLR 574; *Re C (Abduction: Consent)* [1996] 1 FLR 414.

4 *N v N (Abduction: Habitual Residence)* [2000] 3 FCR 84, [2000] 2 FLR 899.

5 *Re F (Child Abduction)* [1992] 1 FLR 548.

6 *Re S (Custody: Habitual Residence)* [1997] 4 All ER 251.

7 *Re M (Minors) (Residence Orders: Jurisdiction)* [1993] 1 FCR 718, [1993] 1 FLR 495, CA; *Re A (Wardship: Jurisdiction)* [1995] 1 FLR 767. A unilateral decision by the parent or parents without a change in the child's physical location does not alter the habitual residence of the child: *Re KM (A Minor: Habitual Residence)* [1996] 2 FCR 333.

8 *Re A (Wardship: Jurisdiction)* [1995] 1 FLR 767; *Re V (Jurisdiction: Habitual Residence)* [2001] 1 FLR 253.

UPDATE

60 Habitual residence of children

TEXT AND NOTES--The question of habitual residence depended on whether, in all the circumstances, the child could properly and realistically be said to be habitually resident: *Re A (a child) (wardship: habitual residence)* [2006] EWHC 3338 (Fam), [2007] 1 FCR 390.

NOTE 5--See *Re F (abduction: unborn child)* [2006] EWHC 2199, [2007] 1 FLR 627 (artificial to consider child as habitually resident in England when never present there).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/2. DOMICILE AND RESIDENCE/(3) RESIDENCE/61. Proof of habitual residence.

61. Proof of habitual residence.

In order to prove habitual residence, it is necessary to establish both a physical presence in the country and an intention to remain there¹. The phrase 'habitual residence' must be given its natural meaning but a comparatively short period of residence may be enough to qualify as 'habitual'². The question is one of fact.

Proof of residence must be accompanied by proof of a settled purpose or intention to remain in the country³, even if the intention is to remain for a comparatively short period of time⁴. The burden of proving a change in habitual residence lies with the party alleging the change⁵.

1 *Shah v Barnet London Borough Council* [1983] 2 AC 309, [1983] 1 All ER 226, HL. For views that settled intention is not an essential element in all cases see *Jurisdiction in Matrimonial Causes* (Law Com no 48) (1972) para 42; and Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 150-151.

2 *Re J (Abduction: Custody Rights)* [1990] 2 AC 562 at 578-579, sub nom *C v S (Minor: Abduction: Illegitimate Child)* [1990] 2 All ER 961 at 965, HL (an 'appreciable time' is required); *Re F (Child Abduction)* [1992] 1 FLR 548 (one month sufficient to acquire habitual residence in Australia); *Nessa v Chief Adjudication Officer* [1999] 4 All ER 677, [1999] 1 WLR 1937, HL (there is no fixed qualifying period of residence). Residence of a year or more is usually enough to establish residence, regardless of the individual's intentions: *M v M (Abduction: England and Scotland)* [1997] 2 FLR 263 (person staying in a country only through force of circumstances with the fixed intention of living elsewhere). See also *Re A (Abduction: Habitual Residence)* [1996] 1 All ER 24, [1996] 1 WLR 25, [1996] 1 FLR 1 (where the father was posted to Iceland on military duty with his family, the children had acquired habitual residence in Iceland). However, a person's presence in a country as an illegal immigrant may not be relied upon to establish habitual residence: *Shah v Barnet London Borough Council* [1983] 2 AC 309, [1983] 1 All ER 226, HL.

3 *Shah v Barnet London Borough Council* [1983] 2 AC 309, [1983] 1 All ER 226, HL; *Re J (Abduction: Custody Rights)* [1990] 2 AC 562, [1990] 2 All ER 961, HL; *Re B (Abduction) (No 2)* [1993] 1 FLR 993. However, see note 1 *supra*.

It seems that habitual residence cannot be lost simply by developing an intention to leave the current residence if this intention is not acted upon: *Re M (Abduction: Habitual Residence)* [1996] 1 FLR 887. Cf the cases cited in para 59 note 10 *ante*.

4 *Kapur v Kapur* [1984] FLR 920 (period of study sufficient for divorce jurisdiction); *Re B (Abduction) (No 2)* [1993] 1 FLR 993 (a couple's move to the wife's country of origin for the limited purpose of resolving matrimonial difficulties was sufficient); *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FCR 385, [2001] 1 FLR 951. Cf *Re B (Abduction: Habitual Residence)* [1994] 2 FLR 915.

The requirement for the necessary state of mind is one of the reasons why there is no minimum qualifying period of residence: *Nessa v Chief Adjudication Officer* [1999] 4 All ER 677, [1999] 1 WLR 1937, HL.

5 *Re R (Wardship: Child Abduction)* [1992] 2 FLR 481.

UPDATE

61 Proof of habitual residence

NOTE 2--A person who has overstayed her leave to remain in the United Kingdom and remains in the United Kingdom unlawfully may assert habitual residence in the jurisdiction for the purposes of a divorce: *Mark v Mark* [2005] UKHL 42, [2005] 3 All ER 912.

NOTE 3--See *L-K v K (No 2)* [2006] EWHC 3280 (Fam), [2007] Fam Law 693 (parties who moved to country after separating were separately established for settled purpose).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(1) IN GENERAL/62. Jurisdiction in actions in personam and in actions in rem.

3. JURISDICTION

(1) IN GENERAL

62. Jurisdiction in actions in personam and in actions in rem.

The jurisdiction of an English¹ court in an action in personam broadly depends upon the service of process (most commonly, a claim form) upon the defendant². If the process may be served (and any challenge to the legality or regularity of such service overcome³) the court will have jurisdiction. At common law it is necessary to draw a distinction between service upon a defendant within the jurisdiction, and service upon a defendant outside the jurisdiction. In the former case, service is permissible as of right, for the defendant is under the authority of the sovereign, and is therefore liable to be summoned, when present within the jurisdiction⁴. By contrast, the intended defendant who is outside the jurisdiction is not so liable; and in the case of such a defendant, service upon him requires the permission of the court⁵.

The principles of jurisdiction in admiralty actions in rem are covered elsewhere in this work⁶, but where these impinge upon the provisions of the 'Brussels I' Regulation⁷, the Brussels Convention⁸ or the Lugano Convention⁹, attention is drawn in this title to the particular problem.

1 As to the meaning of 'English' see para 4 ante.

2 See CPR Pt 7; *Practice Direction--How to Start Proceedings: The Claim Form* PD7A paras 3.1-3.5A. See also CPR 6.12-6.16, 6.30. For convenience, reference in this title to service of a claim form is taken to include service of other forms of process. As to service generally see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq. This part of the title deals with jurisdiction in civil or commercial disputes. Jurisdiction in matrimonial matters is discussed elsewhere: as to divorce and judicial or legal separation and nullity see paras 242-243 post; as to presumptions of death and dissolution of marriage see para 261 post; as to declarations of status see para 264 post; as to financial relief see para 284 post; as to children see para 265 et seq post; and as to declarations of status and legitimacy see para 336 et seq post. As to jurisdiction over questions regarding succession see paras 441-442 post. As to jurisdiction and matters of individual and corporate insolvency see paras 476-477, 505 et seq post.

3 The challenge will be made pursuant to CPR 10.1(3)(b) and CPR Pt 11: see para 64 post. As to the procedure for disputing the court's jurisdiction see CIVIL PROCEDURE vol 11 (2009) PARA 206. Irregularity in service may be cured under the court's case management powers: see generally CPR Pt 3; and CIVIL PROCEDURE vol 11 (2009) PARA 247 et seq.

4 For the proposition that the power of the sovereign to summon a defendant is also the basis of the recognition of foreign judgments under the common law see *Adams v Cape Industries plc* [1990] Ch 433, [1991] 1 All ER 929, CA.

5 Permission is granted in accordance with the Civil Procedure Rules: see CPR Pt 6; and para 98 post.

6 See SHIPPING AND MARITIME LAW vol 93 (2008) PARA 85 et seq.

7 As to the 'Brussels I' Regulation see para 65 text and note 1 post.

8 As to the Brussels Convention see para 65 text and note 2 post.

9 As to the Lugano Convention see para 65 text and note 3 post.

UPDATE

62 Jurisdiction in actions in personam and in actions in rem

NOTE 2--CPR Pt 6 substituted: SI 2008/2178. In the case of overlapping proceedings in separate jurisdictions, both courts should be informed by a representative from each team of the progress of the case in the other jurisdiction: *Moore v Moore* [2007] EWCA Civ 361, [2007] 2 FCR 353.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(1) IN GENERAL/63. Immunity from the jurisdiction of the court.

63. Immunity from the jurisdiction of the court.

Certain individuals and bodies have immunity from the jurisdiction of the English¹ courts. Predominant among these are states, and others entitled to plead sovereign or diplomatic immunity, although the nature and extent of the immunity varies according to the identity of the claimant and the nature of the claim brought². Similar immunities may be conferred upon an international organisation³.

1 As to the meaning of 'English' see para 4 ante.

2 See INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 242 et seq.

3 I.e. by order made under the International Organisations Act 1968: see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 309 et seq.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(1) IN GENERAL/64. Contesting the jurisdiction of the court.

64. Contesting the jurisdiction of the court.

A defendant who has been served with a claim form within or out of the jurisdiction¹ is permitted, after filing an acknowledgement of service², and within the time fixed for the making of such an application³, to challenge the jurisdiction of the court over him⁴. An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision for setting aside the claim form, for setting aside service of the claim form, for discharging any order made before the claim was commenced or before the claim form was served or for staying the proceedings⁵. If the court makes no order on the application, the acknowledgement of service ceases to have effect and the defendant is permitted a further period (which may be at the court's discretion) in which to file a further acknowledgment of service⁶.

An application to challenge the jurisdiction of the court must be made at the outset of the proceedings, for if the defendant takes any step in the proceedings other than a step to challenge the jurisdiction, he will be taken to have waived any opportunity for challenge which he might otherwise have had, and to have submitted to the jurisdiction of the court⁷.

1 le the jurisdiction of the English courts: see para 62 ante. As to the meaning of 'English' see para 4 ante.

2 le in accordance with CPR Pt 10. A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court's jurisdiction: CPR 11(3). As to service generally see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq; and as to acknowledgment of service see CIVIL PROCEDURE vol 11 (2009) PARAS 184-186.

3 See CPR 11(4); and CIVIL PROCEDURE vol 11 (2009) PARA 206.

4 See CPR 10.1(3); and CIVIL PROCEDURE vol 11 (2009) PARA 184. The challenge may consist of either a dispute as to the court's jurisdiction to try the claim, or an argument that the court should not exercise its jurisdiction: see CPR 11(1); CIVIL PROCEDURE vol 11 (2009) PARA 206. See also eg *Canada Trust Co v Stolzenberg* [1997] 4 All ER 983, [1997] 1 WLR 1582, CA (the High Court has an unlimited jurisdiction to decide whether it has jurisdiction to entertain substantive proceedings; the determination of the limits of the court's jurisdiction can be distinguished from the hearing of the case itself).

The procedure by which a challenge to the jurisdiction is made, and the nature of the relief sought by such proceedings, is to be distinguished from an application by a defendant, who does not dispute the existence of jurisdiction, for a stay of proceedings (a procedural stay). An application to the court that it should stay the exercise of its jurisdiction must, ex hypothesi, involve the admission that the court has such jurisdiction in the first place. It follows that an application for a stay should not be made within the procedure for making a challenge to the jurisdiction, for it is antithetical to it; and the mere making of it may itself compel the conclusion that the defendant has already submitted to the jurisdiction of the court: see *The Messiniaki Tolmi* [1984] 1 Lloyd's Rep 266, CA; *Bankers Trust Co v Galadari* [1986] 2 Lloyd's Rep 446, CA. But cf *Finnish Marine Insurance Co Ltd v Protective National Insurance Co* [1990] 1 QB 1078, [1989] 2 All ER 929; *Kuwait Airways Corp v Iraq Airways Co* [1995] 1 Lloyd's Rep 25 at 32, 34, 38, CA (revsd, but not on this point, [1995] 3 All ER 694, [1995] 1 WLR 1147, HL). If the application for a stay is clearly shown to be alternative and subordinate to the application under CPR 10.1(3), it may not be damaging to the applicant-defendant.

It also follows that the obtaining of a such a stay is a matter of procedural law; and it is discussed in this title in the context of procedural relief available to the parties during preparation for trial: see paras 127-135 post.

5 See CPR 11(6); and CIVIL PROCEDURE vol 11 (2009) PARA 206.

6 See CPR 11(7); and CIVIL PROCEDURE vol 11 (2009) PARA 206. Fresh acknowledgment of service in this way constitutes submission to the jurisdiction: see CPR 11(8); and CIVIL PROCEDURE vol 11 (2009) PARA 206. See also *ED & F Man (Sugar) Ltd v Haryanto (No 2)* [1991] 1 Lloyd's Rep 429, CA.

7 See *Williams & Glyn's Bank plc v Astro Dinamico Naviera SA* [1984] 1 All ER 760, [1984] 1 WLR 438, HL; *Kurz v Stella Musical Veranstaltungs GmbH* [1992] Ch 196, [1992] 1 All ER 630. See also *Ngcobo v Thor Chemicals Holdings Ltd* (1995) Times, 10 November, CA (where notice of appeal against a refusal of a stay was struck out because the appellant had, after being given permission to appeal, served a defence to the action, and was therefore to be seen as having withdrawn his objection to the trial being held in England); *Caltex Trading Pte Ltd v Metro Trading International Inc* [2000] 1 All ER (Comm) 108 (in the absence of a timely challenge to jurisdiction, a request for disclosure with the purpose of defeating the claim constituted a voluntary recognition of the court's jurisdiction to hear the claim).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/(i) In general/A. INTRODUCTION/65. Jurisdiction according to the 'Brussels I' Regulation and the Conventions.

(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS

(i) In general

A. INTRODUCTION

65. Jurisdiction according to the 'Brussels I' Regulation and the Conventions.

The jurisdiction of a court in the United Kingdom in a civil or commercial matter is largely determined by the 'Brussels I' Regulation¹ and two European Conventions to which the United Kingdom is party, namely the Brussels Convention² and the Lugano Convention³. The Regulation is, of course, directly applicable within and between all member states of the European Union⁴. Where that Regulation does not apply, the Conventions apply between contracting states⁵.

In effect, the Regulation and the Conventions may provide:

- 4 (1) that the courts of the United Kingdom have jurisdiction in a particular case;
- 5 (2) that the courts of the United Kingdom and those of another Regulation state⁶ or contracting state have jurisdiction in a particular case; or
- 6 (3) that the courts of the United Kingdom have no jurisdiction in a particular case.

If the rules of the Regulation and the Conventions: (a) are inapplicable⁷; or (b) provide that the jurisdiction of a national court in the particular case is to be determined by the national law of that court⁸, the indigenous jurisdictional rules are applicable⁹.

In order to determine whether a court has, or does not have, jurisdiction, the jurisdictional rules as set out in the Regulation and the Conventions must first be applied. The principal basis for jurisdiction is the domicile of the defendant¹⁰, but a number of provisions of the Regulation and the Conventions are applicable without regard to the domicile of the defendant¹¹.

Where the Regulation and the Conventions give jurisdiction to the courts of the United Kingdom, an internal jurisdictional scheme operates to identify the particular part of the United Kingdom which has jurisdiction in the particular case¹².

The Regulation and the Conventions supersede previous treaties and conventions between contracting states (except where the Regulation and Conventions do not apply)¹³. The Civil Jurisdiction and Judgments Act 1982 may be amended by Order in Council in consequence of any revision of the Conventions¹⁴ in order to implement Community obligations¹⁵.

1 le EC Council Regulation 44/2001 (OJ L12, 16.01.2001, p 1) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which entered into force on 1 March 2002 (see art 76). In the Civil Jurisdiction and Judgments Act 1982, the 'Brussels I' Regulation is referred to as 'the Regulation': see s 1(1) (definition added by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2, Pt I, para 1(a)). The legal basis for the 'Brussels I' Regulation is the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) arts 61, 67 (formerly arts 73i, 73o; arts

renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)*[1999] All ER (EC) 646, EC]), which provide for measures in the field of judicial co-operation in civil matters having cross-border implications.

The Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters (OJ C12, 15.1.2001, p 1) states that the 'Brussels I' Regulation is one part of a program of legislation which consists of:

- 1 (1) the 'Brussels I' Regulation which was intended to replace the Brussels Convention 1968 (see note 2 *infra*) and governs all areas of civil and commercial law except for those which are expressly excluded (see the 'Brussels I' Regulation art 68);
- 2 (2) the 'Brussels II' Regulation (ie EC Council Regulation 1347/2000 (OJ L160, 30.6.2000, p 19): see para 242 note 4 *post*), which governs civil proceedings relating to divorce, legal separation or marriage annulment and to civil proceedings relating to parental responsibility for the children of both spouses on the occasion of such matrimonial proceedings (see para 242 *et seq post*);
- 3 (3) an additional Regulation, yet to be adopted at the time at which this volume states the law, which will govern rights in property arising out of a matrimonial relationship (see para 412 *et seq post*); and
- 4 (4) a further Regulation, yet to be adopted at the date at which this volume states the law, which will govern wills and succession (see para 432 *et seq post*).

Additionally, the Programme takes note of EC Council Regulation 1346/2000 (OJ L160, 30.6.2000, p 1) on insolvency proceedings, which applies to collective proceedings which entail the partial or total divestment of the debtor and the appointment of a liquidator: see para 474 *et seq post*. The Programme also states an intention to supplement the 'Brussels II' Regulation (see head (2) *supra*) with proposals to govern:

- 5 (a) certain aspects of divorce litigation or legal separation that are not covered by the 'Brussels II' Regulation (particularly decisions concerning parental responsibility amending decisions taken at the time of the divorce or legal separation); and
- 6 (b) family situations arising through relationships other than marriage.

At the date at which this volume states the law, these proposals have not been adopted in legislation but see the Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing EC Council Regulation 1347/2000 and amending EC Council Regulation 44/2001 in matters relating to maintenance (OJ C203E, 27.8.2002, p 155).

The Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, amends and supplements the Civil Jurisdiction and Judgments Act 1982 to implement the 'Brussels I' Regulation and to preserve the effect of the Brussels Convention (to the extent that it continues to apply) (see note 2 *infra*) and the Lugano Convention (see note 3 *infra*); the Magistrates' Courts (Civil Jurisdiction and Judgments Act 1982) (Amendment) Rules 2002, SI 2002/194, make further provision in relation to the lower courts.

For the meaning of 'United Kingdom' see para 4 *ante*.

2 The Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Brussels, 27 September 1968; EC 46 (1976); Cmnd 7395) (including the Protocol annexed to that Convention). It was entered into by the six original members of the European Community, namely: Belgium, France, Germany (the former Federal Republic), Italy, Luxembourg and the Netherlands. This Convention is referred to in the Civil Jurisdiction and Judgments Act 1982 as 'the 1968 Convention': s 1(1). A Protocol on the interpretation of the Convention by the European Court was signed at Luxembourg on 3 June 1971. See para 68 *post*. This Protocol is referred to in the Civil Jurisdiction and Judgments Act 1982 and in this title as 'the 1971 Protocol': s 1(1). The 1971 Protocol (as amended: see *infra*) is set out in the Civil Jurisdiction and Judgments Act 1982 Sch 2 (as substituted): see s 2(2)(b), Sch 2 (s 2(2) substituted by the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 1990, SI 1990/2591, art 7; and amended by the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 2000, SI 2000/1824, art 6; and the Civil Jurisdiction and Judgments Act 1982 Sch 2 substituted by the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 2000, SI 2000/1824, art 8(2), Sch 2). The obligation upon states entering into membership of the European Community to accede to the Convention is contained in the EC Treaty art 293 (formerly art 220; as renumbered: see note 1 *supra*).

The Brussels Convention and the Protocol have been amended, consequent upon the accession of further states to the European Community, as follows:

- 7 (1) by the Convention on the accession to the 1968 Convention and the 1971 Protocol of Denmark, the Republic of Ireland and the United Kingdom, signed at Luxembourg on 9 October 1978 ('the Accession Convention') (Civil Jurisdiction and Judgments Act 1982 s 1(1));
- 8 (2) by the Convention on the accession of the Hellenic Republic to the 1968 Convention and the 1971 Protocol, with the adjustments made to them by the Accession Convention, signed at

Luxembourg on 25 October 1982 ('the 1982 Accession Convention') (Civil Jurisdiction and Judgments Act 1982 s 1(1) (definition added by the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 1989, SI 1989/1346, art 3));

- 9 (3) by the Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the 1968 Convention and the 1971 Protocol, with the adjustments made to them by the Accession Convention and the 1982 Accession Convention, signed at Donostia-San Sebastián on 26 May 1989 ('the 1989 Accession Convention') (Civil Jurisdiction and Judgments Act 1982 s 1(1) (definition added by the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 1990, SI 1990/2591, art 3));
- 10 (4) by the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the 1968 Convention and the 1971 Protocol, with the adjustments made to them by the Accession Convention, the 1982 Accession Convention and the 1989 Accession Convention, signed at Brussels on 29 November 1996 ('the 1996 Accession Convention') (Civil Jurisdiction and Judgments Act 1982 s 1(1) (definition added by the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 2000, SI 2000/1824, art 3)).

The Civil Jurisdiction and Judgments Act 1982 provides that the Brussels Conventions are to have force of law in the United Kingdom, and that judicial notice is to be taken of them: s 2(1) (amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 2 para 1). 'The Brussels Conventions' means the 1968 Convention, the 1971 Protocol, the Accession Convention, the 1982 Accession Convention, the 1989 Accession Convention and the 1996 Accession Convention: Civil Jurisdiction and Judgments Act 1982 s 1(1) (definition added by the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 1990, SI 1990/2591, art 4; and amended by the Civil Jurisdiction and Judgments Act 1991 s 2(1), (2); and the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 2000, SI 2000/1824, art 3).

For convenience, this title uses the singular form 'the Brussels Convention' to denote the 1968 Convention as amended and adhered to by the United Kingdom. This is the form in which it is set out in the Civil Jurisdiction and Judgments Act 1982 Sch 1 (as substituted): see s 2(2)(a), Sch 1 (s 2(2)(a) as so substituted and amended; and Sch 1 substituted by the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 1990, SI 1990/2591, art 12(1), Sch 1; and amended by the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 2000, SI 2000/1824, art 8(1), Sch 1).

Although the 'Brussels I' Regulation was intended to replace the Brussels Convention in its entirety (see note 1 supra), at the date at which this volume states the law, Denmark had not adopted it, and was therefore not bound by it nor subject to its application, with the result that the Brussels Convention and the 1971 Protocol remain in force in relations between Denmark and the member states that are bound by the Convention: see the 'Brussels I' Regulation Recitals 21-22. Accordingly, for the purposes of the Civil Jurisdiction and Judgments Act 1982, 'Brussels contracting state' means Denmark only: s 1(3) (definition substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt I para 1(b)(i)).

3 The Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Lugano, 16 September 1988, OJ L319, 25.11.88, p 9) (including the Protocols annexed to that Convention), which was signed by the United Kingdom on 18 September 1989: see the Civil Jurisdiction and Judgments Act 1982 s 1(1) (definition added by the Civil Jurisdiction and Judgments Act 1991 s 2(3)). The Lugano Convention has force of law in the United Kingdom, and judicial notice must be taken of it: Civil Jurisdiction and Judgments Act 1982 s 3A(1) (s 3A added by the Civil Jurisdiction and Judgments Act 1991 s 1(1)). The Lugano Convention (as amended on the accession of Poland to that Convention) is set out in the Civil Jurisdiction and Judgments Act 1982 Sch 3C (as added): see s 3A(2), Sch 3C (s 3A(2) as so added; and amended by the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 2000, SI 2000/1824, art 11; and the Civil Jurisdiction and Judgments Act 1982 Sch 3C added by the Civil Jurisdiction and Judgments Act 1991 s 1(3), Sch 1). References to, or to any provision of, the Lugano Convention are to that Convention as amended on the accession to it of Poland: Civil Jurisdiction and Judgments Act 1982 s 1(2)(aa) (added by the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 2000, SI 2000/1824, art 9).

The relevant amendments to the Civil Jurisdiction and Judgments Act 1982 took effect, and the Lugano Convention came into force in the United Kingdom, on 1 May 1992: see the Civil Jurisdiction and Judgments Act 1991 (Commencement) Order 1992, SI 1992/745.

The contracting states to the Lugano Convention, referred to as 'Lugano contracting states', are the original parties to the Lugano Convention (namely, Austria, Belgium, Denmark, Finland, France, Germany (the former Federal Republic), the Hellenic Republic, Iceland, the Republic of Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom) and any party who has subsequently acceded to that Convention (ie at the date at which this volume states the law, Poland): see the Civil Jurisdiction and Judgments Act 1982 s 1(3) (added by the Civil Jurisdiction and Judgments Act 1991 s 2; and amended by the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 2000, SI 2000/1824, art 10). The original parties to the Lugano Convention consisted of the 12 states then party to the Brussels Convention (see note 2 supra) plus the member states of the European Free Trade Association (EFTA) at the time (namely, Austria, Finland, Iceland, Norway, Sweden and Switzerland). Austria, Finland and Sweden have since acceded to the

European Union and ceased to be EFTA states. For the meaning of 'the European Free Trade Association' see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) para 8 note 3.

4 As to the direct applicability in member states of certain measures of European Union law see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 23.

5 In the Civil Jurisdiction and Judgments Act 1982, 'contracting state', without more, means, as applicable, a Brussels contracting state (see note 2 supra) or a Lugano contracting state (see note 3 supra): s 1(3) (definition substituted by the Civil Jurisdiction and Judgments Act 1991 s 2). That terminology has been adopted for this title.

This title retains all references to the Brussels Convention, to reflect its continuing relevance vis-à-vis Denmark (see note 2 supra). The Lugano Convention remains relevant vis-à-vis those contracting states between whom it remains in force, namely all member states of the European Union (including Denmark) and EFTA states (ie Switzerland, Norway and Iceland but not Liechtenstein) plus Poland (see note 3 supra). Where the phrase 'the Conventions' is used, it refers to both the Brussels and Lugano Conventions. Because the text in the articles of the 'Brussels I' Regulation and the Brussels and Lugano Conventions is in most cases (but not all) very similar (see note 8 infra), identical terms in each are given the same meaning except where indicated. All references to case law under the Brussels and Lugano Conventions have been retained, where appropriate, for illustrative purposes, although the only authority on the interpretation of the Regulation remains the European Court (see para 67 post). These considerations apply also to the 'Brussels II' Regulation to the extent that it shares common text with the other three instruments.

6 In the Civil Jurisdiction and Judgments Act 1982, 'Regulation state' has the same meaning as 'member state' in the 'Brussels I' Regulation (ie all member states except Denmark: art 1 para 3): Civil Jurisdiction and Judgments Act 1982 s 1(3) (definition added by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt I para 1(b)(ii)). That terminology has been adopted for this title.

7 See para 72 et seq post.

8 In pursuance of the 'Brussels I' Regulation art 4 and art 4 of the Conventions: see para 88 post. In the Civil Jurisdiction and Judgments Act 1982, any reference to a numbered article, without more, is a reference to the article so numbered in the Brussels Convention and the Lugano Convention, as appropriate: Civil Jurisdiction and Judgments Act 1982 s 1(2)(b) (substituted by the Civil Jurisdiction and Judgments Act 1991 s 2(4)). Thus, a reference to a numbered article of the Conventions is a reference to the article so numbered in both the Brussels Convention and the Lugano Convention, which will be identical in wording and numbering in most cases: see eg notes 10-11 infra.

9 See para 95 et seq post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

10 See the 'Brussels I' Regulation arts 2-3; and arts 2-3 of the Conventions. It has been held that only in exceptional cases should the application of the Brussels Convention be expressly dependent on the claimant being domiciled in a contracting state: *Case C-412/98 Universal General Insurance Co v Group Josi Reinsurance Co SA* [2001] QB 68, ECJ. See also the Civil Jurisdiction and Judgments Act 1982 s 41 (as amended); the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 para 9; and para 83 post.

11 See paras 75-79 post. It is notable, however, that those provisions of the Regulation and Conventions which permit proceedings to be brought against a defendant in courts other than those of his domicile are often accorded a restrictive or narrow interpretation: see eg the cases cited in relation to arts 5-6 of the Conventions (see paras 89-93 post), arts 13-15 (see para 81 post) and art 16 (see paras 75-76 post).

12 See para 66 post.

13 Brussels Convention arts 55-56; Lugano Convention arts 55-56. See the Civil Jurisdiction and Judgments Act 1982 s 9(1) (amended by the Civil Jurisdiction and Judgments Act 1991 Sch 2 para 4), which states that those provisions have the same effect in relation to any statutory provision or rule of law of the United Kingdom which implements a superseded convention, as they have in relation to the superseded conventions themselves. For equivalent provisions as to the relationship of the 'Brussels I' Regulation to other instruments see arts 67-72.

14 See the Civil Jurisdiction and Judgments Act 1982 s 14 (amended by the Civil Jurisdiction and Judgments Act 1991 Sch 2 para 9). The Orders in Council made under this power are: the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 1989, SI 1989/346; the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 1990, SI 1990/2591; the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 1993, SI 1993/603; and the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 2000, SI 2000/1824. See also the Civil Jurisdiction and Judgments Act 1982 (Gibraltar) Order 1997, SI 1997/2602, which makes provision corresponding to the Brussels Convention for the purpose of regulating, as between the United Kingdom and Gibraltar, the jurisdiction of courts and the recognition and enforcement of judgments.

15 See the European Communities Act 1972 s 2(2), which contains a power to make such orders (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 359). This power has been exercised as a consequence of the coming into effect of the 'Brussels I' Regulation: see the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929.

UPDATE

65 Jurisdiction according to the 'Brussels I' Regulation and the Conventions

NOTE 1--'The Regulation' means EC Council Regulation 44/2001 as applied by the Agreement made on 19 October 2005 between the European Community and the Kingdom of Denmark: 1982 Act s 1(1) (amended by SI 2007/1655). Regulation 44/2001 has effect as regards Denmark in accordance with the 2005 Agreement: SI 2001/3929 art 3A (added by SI 2007/1655). The 2005 Agreement came into force on 1 July 2007 (see OJ L94, 4.4.2007, p 70). See Case C-372/07 *Hassett v South Eastern Health Board* (2009) 105 BMLR 115, [2008] All ER (D) 10 (Oct), ECJ.

NOTE 2--'Brussels Contracting State' means a state to which the Brussels Conventions apply and which is excluded from the scope of the Regulation pursuant to the Treaty establishing the European Community art 299: 1982 Act s 1(3) (amended by SI 2007/1655).

NOTES 3, 5--The Lugano Convention has been revised in order to align it with Regulation 44/2001. The revised Convention was signed on 30 October 2007 by the EC, Denmark, Iceland, Norway and Switzerland and replaces the old Convention: see EC Council Decision 2007/712 (OJ L339, 21.12.2007, p 3), EC Council Decision 2009/430 (OJ L147, 10.6.2009, p 5), to which the text of the revised convention is attached.

NOTE 6--'Regulation state' means a member state and now includes Denmark: 1982 Act s 1(3) (amended by SI 2007/1655).

NOTE 10--See Case C-281/02 *Owusu v Jackson* [2005] QB 801, ECJ; *Cook v Plummer* [2008] EWCA Civ 484, [2008] 2 FLR 989; *Catalyst Investment Group Ltd v Lewinsohn*; *ARM Asset-Backed Securities SA v Lewinsohn* [2009] EWHC 1964 (Ch), [2010] 1 All ER (Comm) 751.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/(i) In general/A. INTRODUCTION/66. Jurisdiction between different parts of the United Kingdom.

66. Jurisdiction between different parts of the United Kingdom.

Where the 'Brussels I' Regulation¹ confers jurisdiction on the courts of the United Kingdom², jurisdiction as between different parts of the United Kingdom³ is determined under the Civil Jurisdiction and Judgments Act 1982, which applies a modified version of the jurisdictional provisions of the Regulation⁴.

However, the relevant provisions of that Act have effect subject to the 'Brussels I' Regulation and the Brussels and Lugano Conventions⁵ and do not apply to specified proceedings⁶.

1 As to the 'Brussels I' Regulation see para 65 note 1 ante.

2 For the meaning of 'United Kingdom' see para 4 ante. For these purposes, jurisdiction is conferred when:

- 11 (1) the subject-matter of the proceedings is within the scope of the Regulation as determined by art 1 (see para 74 post), whether or not the Regulation has effect in relation to the proceedings (Civil Jurisdiction and Judgments Act 1982 s 16(1)(a) (substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt II para 3(a)); and
- 12 (2) the defendant or defender is domiciled in the United Kingdom or the proceedings are of a kind mentioned in the Regulation art 22 (see paras 75-76 post) (Civil Jurisdiction and Judgments Act 1982 s 16(1)(b) (amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt II para 3(a))).

3 'Part of the United Kingdom' means England and Wales, Scotland or Northern Ireland: Civil Jurisdiction and Judgments Act 1982 s 50. As to the meanings of 'England', 'English' and 'English law' for the purposes of this title see para 4 ante.

4 See *ibid* s 16(1), Sch 4 (s 16(1) amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt II para 3(a); and the Civil Jurisdiction and Judgments Act 1982 Sch 4 substituted by the Civil Jurisdiction and Judgments Order 2001, Sch 2 Pt II para 4). See also para 73 post.

5 As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

6 Civil Jurisdiction and Judgments Act 1982 ss 16(4), 17(1). For the proceedings that are excluded see Sch 5 (amended by the Financial Services Act 1986 s 188; the Insolvency Act 1986 s 439(2), Sch 14; the Social Security Act 1986 s 86, Sch 10 Part II para 55; the Children Act 1989 s 108(5), Sch 13 para 47; the Companies Act 1989 s 200(2); the Social Security (Consequential Provisions) Act 1992 s 4, Sch 2 para 62; the Petroleum Act 1998 s 50, Sch 4 para 17; the Financial Services and Markets Act 2000 s 432(1), Sch 20 para 3; and the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt II para 5). The list of proceedings there contained may be amended by Order in Council: s 17(2). Such an Order in Council may make different provision for different descriptions of proceedings, for the same description of proceedings in different courts or for different parts of the United Kingdom, and may contain such transitional or incidental provisions as appear appropriate: s 17(3). An Order in Council may not be made unless a draft of it has been laid before and approved by each House of Parliament: s 17(4). At the date at which this volume states the law, no such Order in Council had been made.

UPDATE

66 Jurisdiction between different parts of the United Kingdom

NOTE 6--Civil Jurisdiction and Judgments Act 1982 Sch 5 further amended: Health and Social Care Act 2008 Sch 15 Pt 5.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/(i) In general/B. INTERPRETATION/67. Interpretation of the 'Brussels I' Regulation.

B. INTERPRETATION

67. Interpretation of the 'Brussels I' Regulation.

The 'Brussels I' Regulation¹ is the common jurisdictional statute of the member states of the European Union in civil and commercial matters². Accordingly, the European Court³ has jurisdiction to give rulings upon its interpretation, on references made by national courts⁴. Where such a question is raised in a case pending before a national court, the court must, or in certain circumstances may, request a ruling from the European Court if it considers that a decision on the question is necessary to enable it to give judgment⁵.

It is to be expected that the principles and the case law of the European Court which were developed and applied in relation to the Brussels Convention⁶ remain relevant to the interpretation of the 'Brussels I' Regulation where the text and legal effect of the article in question is the same⁷.

1 As to the 'Brussels I' Regulation see para 65 note 1 ante.

2 The Regulation applies to all member states except Denmark: see art 1 para 3; and para 65 note 6 ante.

3 For the meaning of 'European Court' see para 68 note 2 post.

4 See the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 234 (formerly art 177 and renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ); and arts 65, 68 (formerly arts 73m, 73p (as so renumbered)). The question must have been raised before a court or tribunal against whose decision there is no judicial remedy under national law, when that court or tribunal then comes under a duty to bring the matter before the European Court, unless the European Court has already ruled on the point or unless the correct application of European Union law is obvious: art 234. For the purpose of English civil proceedings, the court of last instance is the House of Lords. As to the making of references to the European Court generally see CIVIL PROCEDURE vol 12 (2009) PARA 1720 et seq. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

5 Ibid art 234. As to when it is necessary for a court to refer a question see CIVIL PROCEDURE vol 12 (2009) PARAS 1722-1724.

6 As to the Brussels Convention see para 65 note 2 ante.

7 See the 'Brussels I' Regulation Recital 19, which states that transitional arrangements were needed to ensure continuity between the Brussels Convention and the Regulation, including the matter of the interpretation of the Brussels Convention by the European Court. As to the interpretation of the Brussels Convention see para 68 post. As to the identification to be drawn between the provisions of the 'Brussels I' Regulation and the Brussels Convention (and the Lugano Convention) see para 65 note 8 ante. As to the Lugano Convention see para 65 note 3 ante. As to the account which is taken in the interpretation of either Convention of decisions of courts in relation to the other Convention and to the 'Brussels I' Regulation see also para 65 note 5 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/(i) In general/B. INTERPRETATION/68. Interpretation of the Brussels Convention.

68. Interpretation of the Brussels Convention.

Under the Brussels Convention¹, the European Court² has jurisdiction to give rulings upon the interpretation of the Convention³, on references made by certain national courts⁴. Where such a question is raised in a case pending before such a court, the court must, or in certain circumstances may, request a ruling from the European Court if it considers that a decision on the question is necessary to enable it to give judgment⁵.

The competent authority⁶ of a contracting state may request the European Court to give a ruling on a question of interpretation if judgments of the courts of that state conflict with either a previous interpretation given by the European Court or a judgment in another contracting state⁷. The registrar of the European Court must notify the contracting states and the institutions of the European Union, who have two months in which to submit statements or observations to the European Court⁸. No fees may be levied, or costs or expenses awarded, in respect of proceedings upon such a request⁹.

In the United Kingdom, any question as to the meaning or effect of any provision of the Brussels Conventions¹⁰ must, if not referred to the European Court as described above, be decided in accordance with the principles laid down by, and any relevant decision of, the European Court¹¹. Without prejudice to this, certain reports may be considered in ascertaining the meaning or effect of any provision of the Brussels Conventions, and must be given such weight as is appropriate in the circumstances¹². Judicial notice must be taken of any decision of, or expression of opinion by, the European Court on any such question¹³.

It has been declared that in interpreting provisions of the Brussels Convention, it is appropriate for the European Court to take due account of the decisions of national courts on the Lugano Convention¹⁴.

1 As to the Brussels Convention see para 65 note 2 ante.

2 In the 1971 Protocol, the Court of Justice of the European Community is referred to as the Court of Justice; in English statutes, the Court of Justice of the European Communities is known as the 'European Court', along with the Court of First Instance: see the European Communities Act 1972 s 1, Sch 1 Pt II (amended by the European Communities (Amendment) Act 2002 s 2), applied by the Interpretation Act 1978 s 5, Sch 1. In this title, the term 'the European Court' will be used to refer to the Court of Justice of the European Community.

3 See the 1971 Protocol art 1. As to the 1971 Protocol see para 65 note 2 ante. The Brussels Convention must be interpreted and applied in accordance with the principles of European law and it bears an autonomous meaning obtained by reference to the system and objectives of the Convention itself: see Case C-89/91 *Shearson Lehman Hutton v Treuhand für Vermögensverwaltung und Beteiligungen mbH* [1993] ECR I-139, ECJ. It is apparent that many of the terms used in the Convention bear a meaning distinct from that which would be accorded to them under national law: see paras 35 ante, 90-91 post.

The European Court also has jurisdiction in relation to the interpretation of the Protocol itself, of the Accession Convention, of the 1982 Accession Convention, of the 1989 Accession Convention and of the 1996 Accession Convention: 1971 Protocol art 1. As to the Accession Convention, the 1982 Accession Convention, the 1989 Accession Convention, and the 1996 Accession Convention: see para 65 note 2 ante. The provisions of the EC Treaty (Rome, 25 March 1957; TS 1 (1973); Cmd 5179), and of the Protocol on the Statute of the Court of Justice, which apply on requests to that court for preliminary rulings, apply to questions of interpretation as described: see the 1971 Protocol art 5.

4 Ibid art 1. The courts which may request the European Court to give a preliminary ruling on a question of interpretation are as follows:

- 13 (1) specifically named courts of the contracting states, which in the case of the United Kingdom are the House of Lords and courts to which application has been made under the Brussels Convention art 37 para 2 (see para 193 post) or art 41 (see para 195 post) (1971 Protocol art 2 para 1);
- 14 (2) the courts of the contracting states when they are sitting in an appellate capacity (art 2 para 2);
- 15 (3) in cases provided under the Brussels Convention art 37 (see para 193 post), the courts referred to therein (1971 Protocol art 2 para 3).

For the meaning of 'contracting state' see para 65 note 5 ante.

5 See the 1971 Protocol art 3. The circumstances in which a reference is mandatory are where the court is one of those referred to in note 4 head (1) supra: see art 3 para 1. Where the court is one referred to in note 4 head (2) or (3) supra, the reference is discretionary: see art 3 para 2. For the procedure in English law see CPR Pt 68; and CIVIL PROCEDURE vol 12 (2009) PARA 1720 et seq. However, the European Court has no jurisdiction to accept a reference from a national court seeking assistance in the interpretation of comparable (but not identical) domestic legislation: see Case C-346/93 *Kleinwort Benson Ltd v Glasgow City Council* [1995] ECR I-615, [1995] All ER (EC) 514, ECJ.

6 See the 1971 Protocol art 4 para 3. In the United Kingdom the competent authority is the appropriate law officer: see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 279. For the meaning of 'United Kingdom' see para 4 ante.

7 See the 1971 Protocol art 4 para 1. The interpretation given by the European Court in response to a request does not affect the judgments which gave rise to the request: art 4 para 2.

8 Ibid art 4 para 4.

9 Ibid art 4 para 5.

10 For the meaning of 'the Brussels Conventions', distinct here from 'the Brussels Convention', see para 65 note 2 ante.

11 Civil Jurisdiction and Judgments Act 1982 s 3(1) (amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 2 para 1).

12 Civil Jurisdiction and Judgments Act 1982 s 3(3) (amended by the Civil Jurisdiction and Judgments Act 1991 Sch 2 para 1; the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 1989, SI 1989/1346, art 8; and the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 1990, SI 1990/2591, art 8). The reports to which reference may be made are:

- 16 (1) the reports by Mr P Jenard on the Brussels Convention and the 1971 Protocol: (OJ C59, 5.3.79, pp 1, 66) (Civil Jurisdiction and Judgments Act 1982 s 3(3)(a) (as so amended));
- 17 (2) the report by Professor Peter Schlosser on the Accession Convention (OJ C59, 5.3.79, p 71) (Civil Jurisdiction and Judgments Act 1982 s 3(3)(b) (as so amended));
- 18 (3) the report by Professor Demetrios I Evrigenis and Professor K D Kerameus on the 1982 Accession Convention (OJ C298, 24.11.86, p 1) (Civil Jurisdiction and Judgments Act 1982 s 3(3)(c) (as so amended)); and
- 19 (4) the report by Mr Martinho de Almeida Cruz, Mr Manuel Desantes Real and Mr P Jenard on the 1989 Accession Convention (OJ C189, 28.7.90, p 35) (Civil Jurisdiction and Judgments Act 1982 s 3(3)(d) (as so amended)).

For the meaning of 'the 1968 Convention' see para 65 note 2 ante.

13 Civil Jurisdiction and Judgments Act 1982 s 3(2).

14 See para 69 text and notes 3-6 post. Furthermore, it is expressly provided that each language version of the Brussels and Lugano Conventions is equally authentic: Brussels Convention art 68; Lugano Convention art 68; 1971 Protocol art 14. It follows that it is permissible to refer to the texts of the Conventions in the other authentic languages, whether or not the English-language text appears to be ambiguous. See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 277-278. As to the Lugano Convention see para 65 note 3 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/(i) In general/B. INTERPRETATION/69. Interpretation of the Lugano Convention.

69. Interpretation of the Lugano Convention.

The courts of each contracting state to the Lugano Convention¹, when applying and interpreting the provisions of that Convention, must pay due account to the principles laid down by the courts of other contracting states in decisions concerning the Convention². This has been declared to mean that it is appropriate for the European Court³, in ruling upon the Brussels Convention⁴, to take due account of the case law of national courts concerning the Lugano Convention, and for the national courts of states interpreting the Lugano Convention⁵ to take due account of case law of national courts, and of the European Court, upon the Brussels Convention⁶.

In the United Kingdom, in accordance with the provisions described above, a court must take account of any principles laid down in any relevant decision delivered by a court of any other Lugano contracting state concerning provisions of the Convention⁷. Without prejudice to this, a specified report on the Convention may be considered in ascertaining the meaning or effect of any provision of the Convention, and must be given such weight as is appropriate in the circumstances⁸.

1 As to the Lugano Convention see para 65 note 3 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

2 Lugano Convention Protocol No 2 art 1. As to the Protocols to the Lugano Convention see para 65 note 3 ante.

3 As to the meaning of 'European Court' see para 68 note 2 ante.

4 By extension, this should include rulings made on the 'Brussels I' Regulation also. As to the Brussels Convention see para 65 note 2 ante; and as to the 'Brussels I' Regulation see para 65 note 1 ante.

5 The states which are Lugano contracting states but not Brussels contracting states: see para 65 notes 2-3 ante.

6 See the Report on the Lugano Convention by Mr P Jenard and Mr G Möller (OJ C189, 28.7.90, p 57 at 90-91). See also para 68 text and note 14 ante.

7 Civil Jurisdiction and Judgments Act 1982 s 3B(1) (s 3B added by the Civil Jurisdiction and Judgments Act 1991 s 1(1)). For the meaning of 'United Kingdom' see para 4 ante.

8 Civil Jurisdiction and Judgments Act 1982 s 3B(2) (as added: see note 7 supra). The report referred to in the text is that mentioned in note 6 supra.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/(i) In general/B. INTERPRETATION/70. Interpretation of provisions regarding jurisdiction as between parts of the United Kingdom.

70. Interpretation of provisions regarding jurisdiction as between parts of the United Kingdom.

In determining any question as to the meaning or effect of any provision for the determination of jurisdiction as between different parts of the United Kingdom¹, regard must be had to any relevant principles laid down by the European Court² in connection with the equivalent provisions of the Brussels Convention³ or the 'Brussels I' Regulation⁴ and to any relevant decision of the European Court as to the meaning or effect of those provisions⁵. Without prejudice to this, the reports which may be considered with regard to the Brussels Convention⁶ may also be considered with regard to the determination of jurisdiction as between parts of the United Kingdom and must, so far as relevant, be given such weight as is appropriate in the circumstances⁷.

The European Court has no jurisdiction to give a preliminary ruling upon a provision merely to enable the domestic court to give judgment on the basis of like provisions contained in domestic rules⁸.

1 Ie any provision of the Civil Jurisdiction and Judgments Act 1982 Sch 4 (as substituted) (as to which see para 66 ante): s 16(3). For the meaning of 'United Kingdom' see para 4 ante; and for the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

2 As to the meaning of 'European Court' see para 68 note 2 ante.

3 Ie the Brussels Convention Title II (arts 2-24). As to the Brussels Convention see para 65 note 2 ante.

4 Ie the 'Brussels I' Regulation Ch II (arts 2-31).

5 Civil Jurisdiction and Judgments Act 1982 s 16(3)(a) (amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt II para 3(c)). However, it will be a rare case in which the text of the Civil Jurisdiction and Judgments Act 1982 Sch 4 (as substituted) bears a materially different meaning from the corresponding provision in the Brussels Convention: *Kleinwort Benson Ltd v Glasgow City Council* [1996] QB 678, [1996] 2 All ER 257, CA; revsd on other grounds [1999] 1 AC 153, [1997] 4 All ER 641, HL. See note 7 infra.

6 See para 68 note 12 ante.

7 Civil Jurisdiction and Judgments Act 1982 s 16(3)(b). Note, however, that the provisions of Sch 4 (as substituted) are derived from the text of the 'Brussels I' Regulation rather than the Brussels Convention. As to the similarity between the texts of the Regulation and the Convention, and the possibility of applying the interpretation of Convention provisions to the Regulation, see para 65 note 5 ante.

8 See Case C-346/93 *Kleinwort Benson Ltd v Glasgow City Council* [1995] ECR I-615, [1995] All ER (EC) 514, ECJ, declining jurisdiction on a reference from *Barclays Bank plc v Glasgow City Council, Kleinwort Benson Ltd v Glasgow City Council* [1994] QB 404, [1994] 4 All ER 865, CA (in relation to the Brussels Convention). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/(i) In general/C. SERVICE/71. Service of claim form.

C. SERVICE

71. Service of claim form.

In any case in which the court has jurisdiction to hear a claim by reason of the 'Brussels I' Regulation¹, the Brussels Convention² or the Lugano Convention³, but the person on whom the claim form is to be served is out of the jurisdiction, the claim form may be served as of right without the necessity for obtaining the permission of the court⁴. But any such claim form must contain a statement of the grounds on which the claimant is entitled to serve it out of the jurisdiction⁵.

1 As to the 'Brussels I' Regulation see para 65 note 1 ante.

2 As to the Brussels Convention see para 65 note 2 ante.

3 As to the Lugano Convention see para 65 note 3 ante.

4 See CPR 6.19; and para 119 post. As to service generally see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq.

5 CPR 6.19(3). Although the statement of grounds is a mandatory requirement under CPR 6.19(3), the failure to include such a statement on a claim form, together with the failure of the court services to notice the error, is an irregularity but does not invalidate service: *Trustor AB v Barclays Bank plc (F Van Lanschot Bankiers (Luxembourg) SA, Pt 20 defendant)*[2000] All ER (D) 1690.

UPDATE

71 Service of claim form

TEXT AND NOTES 4, 5--CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/(i) In general/D. SCOPE OF THE REGULATION AND OF THE CONVENTIONS/72. Time.

D. SCOPE OF THE REGULATION AND OF THE CONVENTIONS

72. Time.

For the purposes of jurisdiction, the 'Brussels I' Regulation¹, the Brussels Convention² or the Lugano Convention³ is applicable only to proceedings commenced, or documents formally drawn up or registered as authentic instruments, on or after the day upon which it came into force⁴.

1 As to the 'Brussels I' Regulation see para 65 note 1 ante.

2 As to the Brussels Convention see para 65 note 2 ante.

3 As to the Lugano Convention see para 65 note 3 ante.

4 'Brussels I' Regulation art 66 para 1; Brussels Convention art 54 1st para; Lugano Convention art 54 1st para. As far as proceedings in the English courts are concerned, any proceedings commenced on or after 1 January 2001 are subject to the jurisdictional rules as contained in the Brussels Convention as modified by the 1996 Accession Convention (see para 65 note 2 ante); the Lugano Convention is applicable to proceedings commenced in the English courts on or after 1 May 1992 (see para 65 note 3 ante); and the 'Brussels I' Regulation is applicable to proceedings commenced in the English courts on or after 1 March 2002 (see para 65 note 1 ante). See also *Trade Indemnity plc v Forsäkringsaktiebolaget Njord (in liquidation)* [1995] 1 All ER 796; *Davy International Ltd v Voest Alpine Industrieranlagenbau GmbH* [1999] 1 All ER 103, CA. As to the date of judgments for the purpose of enforcement see para 185 post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/(i) In general/D. SCOPE OF THE REGULATION AND OF THE CONVENTIONS/73. Application of the 'Brussels I' Regulation and the Conventions within the United Kingdom.

73. Application of the 'Brussels I' Regulation and the Conventions within the United Kingdom.

Where the 'Brussels I' Regulation¹, the Brussels Convention² or the Lugano Convention³ allocates jurisdiction to the courts of a Regulation state⁴ or a contracting state⁵ (as the case may be)⁶, and that state is the United Kingdom⁷, a separate jurisdictional scheme, internal to the United Kingdom and not subject to the jurisdiction of the European Court⁸, will determine which part of the United Kingdom is to have jurisdiction⁹.

1 As to the 'Brussels I' Regulation see para 65 note 1 ante.

2 As to the Brussels Convention see para 65 note 2 ante.

3 As to the Lugano Convention see para 65 note 3 ante.

4 For the meaning of 'Regulation state' see para 65 note 6 ante.

5 For the meaning of 'contracting state' see para 65 note 5 ante.

6 Ie as distinct from allocating jurisdiction to the courts for a place, and in such a case there is no need for a separate provision of internal United Kingdom law.

7 For the meaning of 'United Kingdom' see para 4 ante.

8 Regard must be had, however, to principles laid down by the court in relation to the Brussels Convention or the 'Brussels I' Regulation: see para 70 ante. As to the meaning of 'European Court' see para 68 note 2 ante.

9 See the Civil Jurisdiction and Judgments Act 1982 Sch 4 (as substituted); and para 66 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/(i) In general/D. SCOPE OF THE REGULATION AND OF THE CONVENTIONS/74. Subject matter of the dispute.

74. Subject matter of the dispute.

The 'Brussels I' Regulation¹, the Brussels Convention² and the Lugano Convention³ apply to civil and commercial matters⁴, but do not apply to:

- 7 (1) revenue, customs or administrative matters⁵; or
- 8 (2) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession⁶; or
- 9 (3) bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings⁷; or
- 10 (4) social security⁸; or
- 11 (5) arbitration⁹.

If the Regulation and Conventions are inapplicable, the jurisdiction of the court is determined solely by the indigenous rules of national law¹⁰.

In case law relating to the Conventions¹¹, it has been held that the jurisdictional rules do not apply to matters relating to those rules of procedure which can be applied without jeopardising the jurisdictional rules¹². Nor do they apply to proceedings for the recognition or enforcement of the judgment of a non-contracting (and, by extension, a non-Regulation) state, even if the proceedings by which it is decided whether the judgment is entitled to recognition will involve a trial of what would otherwise appear to be a civil or commercial dispute¹³.

It is stated in the Preambles to the Conventions that they have no application to purely internal cases in which there is no connection with any other contracting state.

If a claimant seeks to rely upon the jurisdictional provisions of a convention on a particular matter against a defendant who would otherwise be entitled to object to the jurisdiction of the English court¹⁴, then at least in principle the claimant is entitled to invoke the provisions of the other convention¹⁵, but he may be prevented from doing so if the same cause of action is pending between the same parties in the courts of another contracting state¹⁶.

1 As to the 'Brussels I' Regulation see para 65 note 1 ante.

2 As to the Brussels Convention see para 65 note 2 ante.

3 As to the Lugano Convention see para 65 note 3 ante.

4 The meaning of 'civil and commercial matters' has been illustrated by decisions of the European Court: see Case 29/76 *LTU Lufttransportunternehmen GmbH & Co KG v Eurocontrol* [1976] ECR 1541, ECJ; Case 814/79 *Netherlands State v Rüffer* [1980] ECR 3807, ECJ; Case C-172/91 *Sonntag v Waidmann* [1993] ECR I-1963, ECJ. In effect it describes claims which are to be seen as matters of private law, rather than public law. It is not decisive that a body which is created under public law, or which is vested with public law powers, is a party to the litigation, for such a body can enter into a private law engagement with another party; but if claim is concerned with the exercise (or non-exercise) of powers which the body has, and private individuals do not, or if it is alleged that it is liable for a legal reason which binds it as a public law body, but which would be inapplicable to a private individual, then the subject matter of the claim is excluded: Case C-172/91 *Sonntag v Waidmann* supra. Thus revenue, customs or administrative matters would be unlikely to have fallen within the scope of the Conventions (and by extension, the Regulation), even without the use of the express words used to exclude them. As to the meaning of 'European Court' see para 68 note 2 ante.

See also *R v Harrow Crown Court, ex p UNIC Centre SARL* [2000] 2 All ER 449, [2000] 1 WLR 2112 (forfeiture proceedings brought in a magistrates court subsequent to a trade mark infringement were predominantly concerned with the determination of private interests and were civil proceedings within the meaning of the Brussels Convention notwithstanding the fact that the local authority, which brought the proceedings, had a duty to prosecute).

5 'Brussels I' Regulation art 1 para 1; Brussels Convention art 1; Lugano Convention art 1. The Brussels Convention does not override the rule that English courts will not directly or indirectly enforce the revenue laws of another country: *QRS 1 ApS v Frandsen* [1999] 3 All ER 289, [1999] 1 WLR 2169, CA. As to the meanings of 'England', 'English' and 'English law' see para 4 post.

6 'Brussels I' Regulation art 1 para 2(a); Brussels Convention art 1 para 1; Lugano Convention art 1 para 1. However, these matters are subject to proposals for further regulation within the European Union: see para 65 note 1 ante.

7 'Brussels I' Regulation art 1 para 2(b); Brussels Convention art 1 para 2; Lugano Convention art 1 para 2. This exclusion is only for claims and matters which fall strictly within the rubric of bankruptcy and insolvent winding up: Case 133/78 *Gourdain v Nadler* [1979] ECR 733, ECJ. A claim, therefore, made by the liquidator of an insolvent company against a defendant debtor to the company is not a claim peculiar to the context of bankruptcy, and is therefore not excluded: Case C-214/89 *Powell Duffryn plc v Petereit* [1992] ECR I-1745, ECJ. By contrast, a claim against the director of an insolvent company under the Insolvency Act 1986, requiring him to contribute to the assets of the insolvent company, would be excluded from the Convention: see the Insolvency Act 1986 ss 212-214; Case 133/78 *Gourdain v Nadler* supra; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) paras 688 et seq, 911 et seq. See also *Re Hayward* [1997] Ch 45, [1997] 1 All ER 32 (a claim by a trustee in bankruptcy to recover from a third party assets asserted to belong to a deceased debtor's estate is not itself a matter of bankruptcy); *UBS AG (as successor to Swiss Bank Corp'n) v Omni Holding AG (in liquidation)* [2000] 1 All ER (Comm) 42, [2000] 1 WLR 916 (claim concerned the determination of rights under a pre-liquidation relationship and did not derive directly from the winding up, so did not fall within the exception); *Ashurst v Pollard* [2001] Ch 595, [2001] 2 All ER 75, CA (claim of a trustee in bankruptcy to recover assets from a third party said to belong to the debtor's estate was not 'principally concerned' with bankruptcy, notwithstanding that the claim arose from the bankruptcy).

Certain cross-border insolvency proceedings are now governed by the European Regulation on Insolvency Proceedings: see para 474 et seq post.

8 'Brussels I' Regulation art 1 para 2(c); Brussels Convention art 1 para 3; Lugano Convention art 1 para 3.

9 'Brussels I' Regulation art 1 para 2(d); Brussels Convention art 1 para 4; Lugano Convention art 1 para 4. In case law relating to the Conventions, this exclusion has been held to extend also to procedural and supervisory judicial proceedings brought prior to or during, and as part of, the arbitration process. Accordingly, an application for the appointment of an arbitrator would not be subject to the provisions of the Conventions (or, by extension, the Regulation): Case C-190/89 *Marc Rich & Co AG v Società Italiana Impianti PA* [1991] ECR I-3855, ECJ. The further effect of the Regulation and the Conventions is unclear. As a matter of English law, a court is required to deny recognition to a foreign judgment rendered in breach of an arbitration agreement: Civil Jurisdiction and Judgments Act 1982 s 32(1), (3). But if the defendant submitted to the proceedings, he loses the protection of s 32: s 32(1)(b). It is unclear whether a court would be at liberty to apply this provision to deny recognition of a judgment otherwise entitled to recognition under the Regulation and Conventions, on the ground that the national court's law of arbitration requires this result, and is entitled to be applied without interference from the Conventions; it is suggested in *Marc Rich & Co AG v Società Italiana Impianti PA (No 2)* [1992] 1 Lloyd's Rep 624, CA, that a court may not do so, but the expression of opinion is obiter dicta, as the defendant had submitted to the jurisdiction of the court which had rendered judgment. See also *Qingdao Ocean Shipping Co v Grace Shipping Establishment, Transatlantic Schifffahrtskontor GmbH, Ode and Heath Chartering (UK) Ltd, The Xing Su Hai* [1995] 2 Lloyd's Rep 15 at 21.

10 See para 95 et seq post.

11 As to the account which must be taken in the interpretation of either Convention of decisions of courts in relation to the other Convention and to the 'Brussels I' Regulation see paras 65 note 5, 67-69 ante.

12 Case 365/88 *Kongress Agentur Hagen GmbH v Zeehaghe BV* [1990] ECR I-1845, ECJ.

13 Case C-129/92 *Owens Bank Ltd v Bracco (No 2)* [1994] QB 509, [1994] 1 All ER 336, [1994] ECR I-117, ECJ.

14 Ie by virtue of the Brussels Convention or the Lugano Convention.

15 See the 'Brussels I' Regulation art 71; the Brussels Convention art 57; the Lugano Convention art 57; and para 125 et seq post.

16 le on the footing that the international obligations are to be interpreted harmoniously, and if the other convention has no provision dealing with *lis alibi pendens*, the provisions of the 'Brussels I' Regulation or the Brussels or Lugano Convention would apply: see Case C-406/92 *The Tatry (cargo owners) v The Maciej Rataj (owners)* [1994] ECR I-5439, [1995] All ER (EC) 229, ECJ; *Frans Maas Logistics (UK) Ltd v CDR Trucking BV* [1999] 1 All ER (Comm) 737, [1999] 2 Lloyd's Rep 179.

UPDATE

74 Subject matter of the dispute

NOTE 4--The armed forces of a state are exercising public powers in their conduct of operations in the territory of another state: Case C-292/05 *Lechouritou v Dimosio tis Omospondiakis Dimokratias tis Germanias* [2007] 2 All ER (Comm) 57, ECJ.

NOTE 9--It is open to the second court seised of the proceedings to determine whether the arbitration exception applies: *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Association Co Ltd* [2004] EWCA Civ 1598, [2005] 1 All ER (Comm) 715. See also *Youell v La Réunion Aérienne* [2009] EWCA Civ 175, [2009] 2 All ER (Comm) 1071.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/(ii) Exclusive Jurisdiction regardless of Domicile/75. Proceedings relating to immovable property.

(ii) Exclusive Jurisdiction regardless of Domicile

75. Proceedings relating to immovable property.

Proceedings which have as their object rights in rem in immovable property or tenancies of immovable property fall within the exclusive jurisdiction of the courts of the Regulation state or of the contracting state¹ or of the particular part of the United Kingdom², as the case may be, in which the property is situated³. The fraction of the claim falling within this definition must represent the dominant or principal part of the claim made⁴. In relation to tenancies, the rule covers claims which are brought to enforce the rent and other common covenants in a lease, but not covenants which, although contained in a lease, are substantively distinct from the obligations of lease⁵. The jurisdiction of the court cannot be denied by the bare allegation that there existed no legally enforceable lease⁶. A claim has as its object rights in rem in immovable property if it is brought to vindicate legal ownership of the land in question, but it is otherwise where the claim is brought to enforce personal obligations owed by the legal owner of the land, even if the ultimate ambition of the claimant in commencing the proceedings is to obtain a transfer of legal title to the land⁷. Accordingly, an action to enforce a contract for the conveyance of land does not constitute such proceedings, and if the claim does not involve the application of rules of land law, and is governed instead by rules applicable to all property, it is unlikely that it will constitute such proceedings⁸.

However, in relation to proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the contracting state in which the defendant is domiciled also have jurisdiction provided that: (1) as regards the 'Brussels I' Regulation and Brussels Convention and the determination of jurisdiction within a part of the United Kingdom, the landlord and tenant are natural persons and domiciled in the same Regulation state or contracting state (or, as the case may be, part of the United Kingdom); or (2) as regards the Lugano Convention, the tenant is a natural person and neither party is domiciled in the contracting state in which the property is situated⁹.

1 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

2 For the meaning of 'United Kingdom' see para 4 ante; and for the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

3 'Brussels I' Regulation art 22 para 1; Brussels Convention art 16 para 1(a); Lugano Convention art 16 para 1(a). See also the Civil Jurisdiction and Judgments Act 1982 s 16(1)(b), Sch 4 rule 11(a)(i) (s 16(1)(b) amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt I para 3(a)(ii); and the Civil Jurisdiction and Judgments Act 1982 Sch 4 substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt I para 4). When deciding whether the Brussels Convention art 16 para 1 applies in a particular case, it is material to have regard to whether the proceedings involve a factual investigation which is best carried out by the courts of the state in which the property is situated or whether questions of local law or practice are raised, or both: *Ashurst v Pollard* [2001] Ch 595, [2001] 2 All ER 75, CA.

For a case involving land straddling an international frontier see Case 158/87 *Scherrens v Maenhout* [1988] ECR 3791, ECJ. For a qualification of this rule in its application to short private lettings see the text and note 9 infra. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. As to the adaptation of the provisions of the Conventions by the Civil Jurisdiction and Judgments Act 1982 Sch 4 (as substituted) to a scheme applying as between parts of the United Kingdom see para 66 ante. As to the

interpretation of the scheme by reference to decisions under the Brussels Convention or the 'Brussels I' Regulation see para 70 ante.

4 Case C-280/90 *Hacker v Euro-Relais* [1992] ECR I-1111, ECJ.

5 Contrast Case 73/77 *Sanders v van der Putte* [1977] ECR 2383, ECJ, with Case 241/83 *Rösler v Rottwinkel* [1985] ECR 99, [1985] 1 CMLR 806, ECJ. See also *Barratt International Resorts Ltd v Martin* 1994 SLT 434, Ct of Sess, where a contract of management of a timeshare development was not a tenancy within this provision; *Jarrett v Barclays Bank plc* [1999] QB 1, [1997] 2 All ER 484, CA, where timeshare agreements which entitled the claimants to exclusive occupation of immovable property fell within the meaning of the Brussels Convention art 16 para 1, but actions based on the debtor-creditor-supplier agreements arising out of the timeshare agreements did not.

6 See Case 73/77 *Sanders v van der Putte* [1977] ECR 2383, ECJ; Case 158/87 *Scherrens v Maenhout* [1988] ECR 3791, ECJ.

7 Case C-294/92 *Webb v Webb* [1994] QB 696, [1994] 3 All ER 911, [1994] ECR I-1717, ECJ; *Barratt International Resorts Ltd v Martin* 1994 SLT 434, Ct of Sess. See also Case C-292/93 *Lieber v Göbel* [1994] ECR I-2535, ECJ. As to a foreign property part-owned by a deceased bankrupt where the deceased's widow upon intestacy has transferred his interest to a third party see *Re Hayward* [1997] Ch 45, [1997] 1 All ER 22 (trustee's claim was in relation to a right in rem in immovable property which fell within the Brussels Convention art 16). See also *Ashurst v Pollard* [2001] Ch 595, [2001] 2 All ER 75, CA (proceedings to enforce an English trust for sale of a foreign property raised personal issues between the trustee in bankruptcy and the owners which did not relate to a right in rem for the purposes of the Brussels Convention art 16(1)). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

8 See Case C-294/92 *Webb v Webb* [1994] QB 696, [1994] 3 All ER 911, [1994] ECR I-1717, ECJ; Case 115/88 *Reichert v Dresdner Bank AG* [1990] ECR I-27, ECJ.

9 'Brussels I' Regulation art 22 para 1 proviso; Brussels Convention art 16 para 1(b); Lugano Convention art 16 para 1(b). See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 11(a)(ii) (Sch 4 as substituted: see note 3 supra). This provision was designed to reverse the effect of the decision in Case 241/83 *Rösler v Rottwinkel* [1985] ECR 99, [1985] 1 CMLR 806, ECJ, and is intended to ensure that disputes as to tenancies arising out of holiday lettings are not confined to the exclusive jurisdiction of the contracting state in which the land is situated: see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 948-950.

UPDATE

75 Proceedings relating to immovable property

NOTE 3--The Cypriot courts have exclusive jurisdiction for land situated in northern Cyprus, even though the Cypriot government does not exercise effective control of that area and the application of the *acquis communautaire* is suspended there: Case C-420/07 *Apostolides v Orams* (2009) Times, 1 May, ECJ. See Case C-343/04 *Land Oberösterreich v CEZ* [2006] 2 All ER (Comm) 665, ECJ (Brussels Convention art 16 para 1(a) did not apply to action for cessation of a nuisance). See also *Orams v Apostolides* [2010] EWCA Civ 9, [2010] All ER (D) 105 (Jan).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/(ii) Exclusive Jurisdiction regardless of Domicile/76. Other proceedings.

76. Other proceedings.

Apart from proceedings concerning immovable property¹, the other cases in which exclusive jurisdiction, regardless of domicile, is conferred on the courts of a particular Regulation state or contracting state², are as follows:

- 12 (1) in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the decisions of their organs, exclusive jurisdiction is conferred upon the courts of the Regulation state or contracting state in which the company, legal person or association has its seat³;
- 13 (2) in proceedings which have as their object the validity of entries in public registers, exclusive jurisdiction is conferred upon the courts of the Regulation state or contracting state in which the register is kept⁴;
- 14 (3) in proceedings concerned with the registration or validity of patents, trade marks, designs or other similar rights required to be deposited or registered, exclusive jurisdiction is conferred upon the courts of the Regulation state or contracting state in which the deposit or registration has been applied for, has taken place, or is under the terms of an international convention deemed to have taken place⁵;
- 15 (4) in proceedings concerned with the enforcement of judgments⁶, exclusive jurisdiction is conferred upon the courts of the Regulation state or contracting state in which the judgment has been or is to be enforced⁷.

Neither the Regulation nor the Conventions make specific provision for a case in which the land, corporate seat, public register, or place of deposit or registration, is in a non-contracting or non-Regulation state⁸.

The provisions described above apply, with certain modifications⁹, so as to confer exclusive jurisdiction on the courts of one particular part of the United Kingdom rather than another¹⁰.

1 See para 75 ante.

2 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

3 'Brussels I' Regulation art 22 para 2; Brussels Convention art 16 para 2; Lugano Convention art 16 para 2. Under the 'Brussels I' Regulation, the court must apply its own rules of private international law to determine that seat: art 22 para 2. For the purposes of art 16 para 2 of the Brussels and Lugano Conventions (and for the purposes of the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 11(b) (as substituted) (see the text and notes 9-10 infra)) these rules are set out in the Civil Jurisdiction and Judgments Act 1982 s 43 (see para 85 post). As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante. An English partnership, even if not formally constituted, is an association of natural or legal persons within the meaning of the Brussels Convention art 16 para 2: *Phillips v Symes* [2002] 1 WLR 853. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

It must be the validity of the decisions of organs, as distinct from the decisions themselves, which is the object of the proceedings: *Newtherapeutics Ltd v Katz* [1991] Ch 226, [1991] 2 All ER 151. Claims alleging want or excess of authority may fall within the Brussels Convention art 16, but those alleging abuse of authority will not,

as the latter are not concerned with the acts of the organs of a company, but wrongful acts of individuals:
Grupo Torras SA v Sheikh Fahad Mohammed Al-Sabeh [1996] 1 Lloyd's Rep 7, CA.

4 'Brussels I' Regulation art 22 para 3; Brussels Convention art 16 para 3; Lugano Convention art 16 para 3.
 See *Re Fagin's Bookshop plc* [1992] BCLC 118 (company's register of members).

5 'Brussels I' Regulation art 22 para 4; Brussels Convention art 16 para 4; Lugano Convention art 16 para 4.
 This will apply to a case where the essential validity of a patent is in issue, but not (for example) to an action for the infringement of a patent: Case 288/82 *Duijnstee v Goderbauer* [1983] ECR 3663, [1985] 1 CMLR 220, ECJ (obligation of employee to transfer patent rights to employer).

The logic of the rule in *Companhia de Moçambique v British South Africa Co* [1892] 2 QB 358 (see para 393 post) excluded jurisdiction over actions for breaches of foreign copyright in England: see *Tyburn Productions Ltd v Conan Doyle* [1991] Ch 75, [1990] 1 All ER 909. However, this rule can be overridden in some cases where jurisdiction is derived from the Brussels Convention and where the existence and validity of the copyright are not in question: see *Coin Controls Ltd v Suzo International (UK) Ltd* [1999] Ch 33, [1997] 3 All ER 45; *Fort Dodge Animal Health Ltd v Akzo Nobel NV* [1998] FSR 222, CA; *Pearce v Ove Arup Partnership Ltd* [2000] Ch 403, [1999] 1 All ER 769, CA (validity of a Dutch copyright fell within the exclusive jurisdiction of the Dutch courts but infringement of the same copyright in Holland did not).

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents (Munich, 5 October 1973; TS 20 (1978); Cmnd 7090), the 'Brussels I' Regulation grants exclusive jurisdiction, regardless of domicile, to the courts of each member state, in proceedings concerned with the registration or validity of any European patent granted for that state: art 22 para 4.

6 'Judgment' means any judgment given by a court or tribunal of a Regulation state or contracting state, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court: 'Brussels I' Regulation art 32; Brussels Convention art 25; Lugano Convention art 25.

7 'Brussels I' Regulation art 22 para 5; Brussels Convention art 16 para 5; Lugano Convention art 16 para 5.
 The manner and form of enforcement proceedings, such as means of execution, fall within this provision: see the report by Mr P Jenard on the Brussels Convention (OJ C59, 5.3.79, p 1 at 36); and Case C-129/92 *Owens Bank Ltd v Bracco (No 2)* [1994] QB 509, [1994] 1 All ER 336, [1994] ECR I-117, ECJ.

In case law relating to the Conventions, measures pre-emptively taken to make the future enforcement of a contracting state judgment more successful are not within these provisions: Case C-261/90 *Reichert v Dresdner Bank AG (No 2)* [1992] ECR I-2149, ECJ. The Conventions as a whole have no application to proceedings concerned with the recognition or enforcement of judgments from non-contracting states: Case C-129/92 *Owens Bank Ltd v Bracco (No 2)* [1994] QB 509, [1994] 1 All ER 336, [1994] ECR I-117, ECJ. As to the account which must be taken in the interpretation of either Convention of decisions of courts in relation to the other Convention and to the 'Brussels I' Regulation see paras 65 note 5, 67-69 ante. For the meaning of 'the Brussels Convention' see para 65 note 2 ante. For the meaning of 'the Conventions' see para 65 note 5 ante.

8 In such a case it appears that the jurisdiction of the court may be asserted under one of the other provisions of the Regulation or of the Conventions; the question whether an English court could, in such a case, order a discretionary stay of proceedings is unclear: see para 94 post.

9 The modifications are that:

- 20 (1) head (3) in the text is omitted;
- 21 (2) in each case, a reference to 'part of the United Kingdom' is substituted for the reference to 'member state'; and
- 22 (3) in head (1) in the text, the reference to the decisions of the organs of persons, companies etc, is omitted.

For the meaning of 'United Kingdom' see para 4 ante; and for the meaning of 'part of the United Kingdom' see para 66 note 3 ante. As to the adaptation of the provisions of the 'Brussels I' Regulation by the Civil Jurisdiction and Judgments Act 1982 Sch 4 (as substituted) to a scheme applying as between parts of the United Kingdom see para 66 ante. As to the interpretation of the scheme by reference to decisions under the Brussels Convention or the 'Brussels I' Regulation see para 70 ante.

10 See the Civil Jurisdiction and Judgments Act 1982 s 16(1) (as amended), Sch 4 rules 11(b)-(d) (as substituted). For the purposes of Sch 4 rule 11(b) (as substituted), the rules of private international law that determine where a corporation or association has its seat are set out in the Civil Jurisdiction and Judgments Act 1982 s 43 (see para 85 post).

UPDATE

76 Other proceedings

NOTES 2-7--It is unnecessary, and wrong, to construe 'regardless of domicile' as having any application to case where person to be sued is not domiciled in a member state: *Choudhary v Bhatler* [2009] EWCA Civ 1176, [2009] All ER (D) 131 (Nov).

NOTE 3--See *Speed Investments Ltd v Formula One Holdings Ltd (No 2)* [2004] EWCA Civ 1512, [2005] 1 WLR 1936 (validity of appointment of director came within the Lugano Convention art 16).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/(ii) Exclusive Jurisdiction regardless of Domicile/77. Consequences of exclusive jurisdiction.

77. Consequences of exclusive jurisdiction.

If a court of a Regulation state or contracting state¹, or of a particular part of the United Kingdom², is seised of a claim which is principally concerned with a matter over which the courts of another Regulation state or contracting state (or, as the case may be, another part of the United Kingdom) have exclusive jurisdiction³, the court must declare of its own motion that it has no jurisdiction⁴. Agreements or provisions of trust instruments conferring jurisdiction have no legal force if the court whose jurisdiction they purport to exclude has exclusive jurisdiction⁵; and it is not open to the defendant to submit to the jurisdiction of any other court⁶.

Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised must decline jurisdiction in favour of that court⁷.

Under the Conventions⁸, a judgment from another court in circumstances which conflict with the exclusive jurisdiction must not be recognised⁹.

1 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

2 For the meaning of 'United Kingdom' see para 4 ante; and for the meaning of 'part of the United Kingdom' see para 66 note 3 ante. As to the adaptation of the provisions of the Conventions by the Civil Jurisdiction and Judgments Act 1982 s 16 (as amended), Sch 4 (as substituted) to a scheme applying as between parts of the United Kingdom see para 66 ante. As to the interpretation of the scheme by reference to decisions under the Brussels Convention or the 'Brussels I' Regulation see para 70 ante. For the meaning of 'the Conventions' see para 65 note 5 ante.

3 I.e. under the 'Brussels I' Regulation art 22; the Brussels Convention art 16; the Lugano Convention art 16; or the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 11 (Sch 4 as substituted): see paras 75-76 ante.

4 'Brussels I' Regulation art 25; Brussels Convention art 19; Lugano Convention art 19. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 14 (Sch 4 substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt II para 4).

5 'Brussels I' Regulation art 23 para 5; Brussels Convention art 17, 4th para; Lugano Convention art 17 para 3. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 12(2) (Sch 4 as substituted: see note 4 supra). As to the meaning of 'exclusive' in art 17 of the Conventions (and, by extension, art 23 of the Regulation) see para 79 note 3 post. As to references to numbered articles of the Conventions see para 65 note 8 ante.

6 'Brussels I' Regulation art 24; Brussels Convention art 18; Lugano Convention art 18. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 13(1) (Sch 4 as substituted: see note 4 supra). See para 78 post.

7 'Brussels I' Regulation art 29; Brussels Convention art 23; Lugano Convention art 23. As to which court is first seised of proceedings see para 127 post.

8 This does not apply to the application of provisions to the United Kingdom.

9 See the 'Brussels I' Regulation art 35 para 1; Brussels Convention art 28, 1st para; Lugano Convention art 28, 1st para. As to refusal of recognition generally under art 35 of the Regulation and under art 28 of the Conventions see para 188 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/(iii) Prorogation of Jurisdiction/78. Jurisdiction by submission.

(iii) Prorogation of Jurisdiction

78. Jurisdiction by submission.

In addition to cases where jurisdiction may be specifically conferred¹, a court before which a defendant enters an appearance has jurisdiction². However, this does not apply where exclusive jurisdiction is conferred³ on the courts of a particular Regulation state or contracting state⁴ or, as the case may be, of a particular part of the United Kingdom⁵.

Jurisdiction is not conferred if appearance was entered solely to contest the jurisdiction⁶. Thus if the defendant takes the steps prescribed by national procedural law for a challenge to the jurisdiction of the court, on the first available opportunity, he will not be treated as having conferred jurisdiction on the court by the entering of an appearance⁷. If national procedural law also requires that he lodge a defence on the merits, a court is still entitled to find that the defendant has not conferred jurisdiction by entering his appearance⁸.

1 See paras 80-93 post. See also note 2 infra.

2 'Brussels I' Regulation art 24; Brussels Convention art 18; Lugano Convention art 18. See also the Civil Jurisdiction and Judgments Act 1982 s 16(1), Sch 4 rule 13(1) (s 16(1) amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt II para 3(a); and the Civil Jurisdiction and Judgments Act 1982 Sch 4 substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt II para 4). As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. As to the adaptation of the provisions of the 'Brussels I' Regulation by the Civil Jurisdiction and Judgments Act 1982 Sch 4 (as substituted) to a scheme applying as between parts of the United Kingdom see para 66 ante. As to the interpretation of the scheme by reference to decisions under the Brussels Convention or the 'Brussels I' Regulation see para 70 ante. In English law, if a defendant: (1) files an acknowledgment of service but fails to challenge the court's jurisdiction within the specified time limit; or (2) having challenged the court's jurisdiction unsuccessfully, files a further acknowledgment of service, he is treated as having accepted that the court has jurisdiction to try the claim: see CPR 11.5, 11.8. As to contesting the jurisdiction of the court see para 64 ante. As to acknowledgment of service generally see CIVIL PROCEDURE vol 11 (2009) PARAS 184-186. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Note that the provisions cited supra are expressed in each case to be subject only to art 22 (in the case of the 'Brussels I' Regulation), to art 16 (in the case of the Conventions), and to rule 11 (in the case of the Civil Jurisdiction and Judgments Act 1982 Sch 4 (as substituted)) (see the text and notes 3-5 infra). It follows that the other provisions of the 'Brussels I' Regulation and of the Conventions (and of the Civil Jurisdiction and Judgments Act 1982 Sch 4 (as substituted)) which confer jurisdiction, referred to in the text and note 1 supra, may be defeated by submission to jurisdiction. For the meaning of 'the Conventions' see para 65 note 5 ante.

3 I.e. by the 'Brussels I' Regulation art 22; the Brussels Convention art 16; the Lugano Convention art 16; or the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 11 (Sch 4 as substituted): see paras 75-76 ante.

4 'Brussels I' Regulation art 24; Brussels Convention art 18; Lugano Convention art 18. For the meaning of 'contracting state' see para 65 note 5 ante.

5 Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 13(1) (Sch 4 as substituted: see note 2 supra). For the meaning of 'United Kingdom' see para 4 ante; and for the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

6 'Brussels I' Regulation art 24; Brussels Convention art 18; Lugano Convention art 18. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 13(2) (Sch 4 as substituted: see note 2 supra). This is confirmed in English law: see CPR 11(3); and para 64 note 2 ante.

7 Case 150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] ECR 1671, [1982] 3 CMLR 1, ECJ; Case 27/81 *Etablissements Röhr SA v Ossberger* [1981] ECR 2431, [1982] 3 CMLR 29, ECJ. See also *Kurz v Stella Musical Veranstaaltungs GmbH* [1992] Ch 196, [1992] 1 All ER 630. It is the purpose for which he enters an appearance, not the form of the appearance itself, which is determinative.

8 See Case 150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] ECR 1671, [1982] 3 CMLR 1, ECJ; Case 27/81 *Etablissements Röhr SA v Ossberger* [1981] ECR 2431, [1982] 3 CMLR 29, ECJ.

UPDATE

78 Jurisdiction by submission

NOTE 5--A defendant who entered an appearance is to be taken to be aware that the court has discretionary power to permit claims to be amended: *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), [2009] 2 All ER (Comm) 287.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/(iii) Prorogation of Jurisdiction/79. Jurisdiction derived from a choice of court agreement.

79. Jurisdiction derived from a choice of court agreement.

If the parties, one or more of whom is domiciled in a Regulation state or in a contracting state (as the case may be)¹, have agreed that a court or the courts of a Regulation state or a contracting state² is or are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts have exclusive³ jurisdiction⁴. Similarly, the court or courts of a Regulation state or contracting state on which a trust instrument has conferred jurisdiction have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved⁵.

However, if a defendant enters an appearance in another court, he is taken to have waived a breach of this exclusive jurisdiction⁶. Agreements or provisions of a trust instrument conferring jurisdiction have no legal force if they are contrary to the provisions of the schemes regarding jurisdiction over insurance contracts⁷ or consumer contracts⁸ or (in the case of the 'Brussels I' Regulation only) individual contracts of employment⁹, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction¹⁰ under the Regulation or Conventions¹¹. A judgment given by a court accepting jurisdiction in violation of the provisions described above may not, on that account, be denied recognition¹².

For a choice of court agreement to confer exclusive jurisdiction, one of the parties must be domiciled in a contracting state¹³; if this is not so, the courts of other Regulation states or contracting states (as the case may be) have no jurisdiction unless the court chosen has declined jurisdiction¹⁴. The form in which the agreement is recorded must be either: (1) in writing or evidenced in writing; or (2) in a form which accords with the practices which the parties have established between themselves; or (3) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware, and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned¹⁵.

The parties must have agreed to the clause; and a national court must assure itself both that they did agree, and that the agreement covers the proceedings which the claimant now brings¹⁶, but it is not open to a court to deny the legal effect of the clause by reason of its failure also to comply with formal requirements of national law¹⁷, nor on the ground of its incompatibility with other mandatory laws of the forum which would have rendered the agreement void of legal effect¹⁸. However, in relation to the Conventions only, if the agreement is shown to have been entered into for the benefit of only one of the parties to it, that party retains the right to waive the agreement and sue in another court which would otherwise have jurisdiction over the defendant¹⁹.

In the context of an individual contract of employment, the Brussels Convention provides that an agreement conferring jurisdiction has legal force only if it is entered into after the dispute has arisen or if the employee invokes it to seize courts other than those for the defendant's domicile or those specified by the Conventions²⁰. Under the Lugano Convention an agreement in relation to such matters has effect only if it is entered into after the dispute has arisen²¹. Under the 'Brussels I' Regulation, jurisdiction in matters relating to individual contracts of employment can be determined only in accordance with the provisions of the Regulation²².

Under the scheme for determining jurisdiction within the United Kingdom²³, if the parties have agreed that a court or courts of a part of the United Kingdom²⁴ are to have jurisdiction to settle any disputes which have arisen or may arise in connection with a particular legal relationship and the agreement would be effective²⁵ to confer jurisdiction under the law of that part, that court or those courts have jurisdiction²⁶. The court or courts of a part of the United Kingdom on which a trust instrument has conferred jurisdiction has jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved²⁷. Agreements or provisions of a trust instrument conferring jurisdiction have no legal force if they are contrary to the provisions of the scheme regarding jurisdiction over consumer contracts²⁸, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction²⁹ under the scheme³⁰.

1 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

2 The provisions apply only to choice of court agreements for the courts of a contracting state, and they have no application in the case of an agreement upon the courts of a non-contracting state: Case C-387/98 *Coreck Maritime GmbH v Handelsveem BV* [2000] ECR I-9337, ECJ. As to the position where proceedings are sought to be stayed, by virtue of a choice of court agreement, in favour of a court of a non-contracting state, see para 94 post.

3 The 'Brussels I' Regulation provides that the jurisdiction under such agreements is exclusive unless the parties have agreed to non-exclusive jurisdiction: art 23 para 1. Under the Conventions, 'exclusive' does not limit the parties to choosing a unique (ie single) jurisdiction, since they may confer jurisdiction on courts of two or more contracting states and their choice may include or exclude courts which would otherwise have had jurisdiction under the other articles of the Convention: see *Kurz v Stella Musical Verantstaltungen GmbH* [1992] Ch 196, [1992] 1 All ER 630 (Brussels Convention); *Insured Financial Structures Ltd v Elektrociepłownia Tychy SA* [2003] EWCA Civ 110, [2003] 2 WLR 656 (Lugano Convention). Thus if a single court is expressed to be competent for actions against A, and another for actions against B, there is no doubt that the clause will be effective: see Case 23/78 *Meeth v Glacetal Sarl* [1978] ECR 2133, [1979] 1 CMLR 520, ECJ. Cf the position as regards jurisdiction within the United Kingdom: see the text and note 26 infra. As to the 'Brussels I' Regulation see para 65 note 1 ante. For the meaning of 'the Conventions' see para 65 note 5 ante.

4 'Brussels I' Regulation art 23 para 1; Brussels Convention art 17, 1st para; Lugano Convention art 17 para 1. In circumstances where, under the Conventions, both art 6 para 2 (see para 93 post) and art 17 apply, then art 17, being mandatory in nature, takes precedence to determine jurisdiction, even if it conflicts with the mandatory principle of art 2 (see para 83 post): *Hough v P & O Containers Ltd (Blohm & Voss Holding AG, third party)* [1999] QB 834, [1998] 2 All ER 978, [1998] 2 Lloyd's Rep 318. As to the relationship between art 17 of the Conventions and arts 21 and 22 see *Lexmar Corp'n and Steamship Mutual Underwriting Association (Bermuda) Ltd v Nordisk Skibsrederforening and Northern Tankers (Cyprus) Ltd* [1997] 1 Lloyd's Rep 289 (exclusive jurisdiction under the Lugano Convention art 17 means that jurisdiction is allowed to no other court in any circumstances whatsoever and arts 21 and 22 cannot apply); and para 128 note 4 post. However, the jurisdiction derived from art 17 of the Conventions cannot oust the jurisdictions derived from art 16 (see paras 75-76 ante) or art 18 (see para 78 ante). As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. Note that the Brussels Convention art 17 has been considerably amended on each occasion upon which a new member state (except in the case of Greece) has acceded to the Convention (see para 65 note 2 ante). Early decisions of the European Court must be read with this in mind. As to the meaning of 'European Court' see para 68 note 2 ante.

An exclusive jurisdiction clause does not have to be formulated in such a way that the identity of the forum chosen is apparent from its wording alone; it may be sufficient for it to be ascertainable by the particular circumstances of the case: Case C-387/98 *Coreck Maritime GmbH v Handelsveem BV* [2000] ECR I-9337, ECJ. There is no requirement for there to be an objective connection between the relationship that is in dispute and the court chosen by such an agreement: Case C-159/97 *Transporti Castelleti SpA v Hugo Trumpy SpA* [1999] ECR I-1597, ECJ.

5 'Brussels I' Regulation art 23 para 4; Brussels Convention art 17, 3rd para; Lugano Convention art 17 para 2.

6 Case 150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] ECR 1671, [1982] 3 CMLR 1, ECJ (variation of a contract by consent).

7 Ie the 'Brussels I' Regulation art 13; and art 12 of the Conventions: see para 80 text and notes 11-16 post.

8 Ie the 'Brussels I' Regulation art 17; and art 15 of the Conventions: see para 81 text and notes 12-13 post.

9 le the 'Brussels I' Regulation art 21: see para 82 post.

10 le conferred by the 'Brussels I' Regulation art 22 or by art 16 of the Conventions: see paras 75-76 ante. As to references to numbered articles of the Conventions see para 65 note 8 ante.

11 'Brussels I' Regulation art 23 para 5; Brussels Convention art 17, 4th para; Lugano Convention art 17 para 3.

12 'Brussels I' Regulation art 35 para 3; Brussels Convention art 28, 3rd para; Lugano Convention art 28, 4th para. See also the Civil Jurisdiction and Judgments Act 1982 s 32(4) (as amended), which provides that s 32(1) (refusal of recognition or enforcement where proceedings are in breach of the agreement) does not apply to judgments required to be recognised under the Conventions or the 'Brussels I' Regulation: see para 147 post. It has been held that a court seised second, which believes that it has jurisdiction under the Brussels Convention art 17 or the Lugano Convention art 17 (or the 'Brussels I' Regulation art 23), is entitled to proceed to hear the case: *Kloeckner & Co AG v Gatoil Overseas Inc* [1990] 1 Lloyd's Rep 177; *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 2 All ER 540, [1994] 1 WLR 588, CA; and see para 128 post.

13 'Brussels I' Regulation art 23 para 1; Brussels Convention art 17, 1st para; Lugano Convention art 17 para 1.

14 'Brussels I' Regulation art 23 para 3; Brussels Convention art 17, 2nd para; Lugano Convention art 17 para 1.

15 'Brussels I' Regulation art 23 para 1(a)-(c); Brussels Convention art 17, 1st para (a)-(c); Lugano Convention art 17 para 1(a)-(c). For these purposes, under the 'Brussels I' Regulation, any communication by electronic means which provides a durable record of the agreement is equivalent to writing: art 23 para 2.

Early decisions of the European Court tended to give a very strict construction to these requirements, demanding clear writing to demonstrate that the defendant had seen the clause and had assented to it: Case 24/76 *Estasis Salotti di Colzani Aimo e Gianmario Colzani v RUWA Polstereimaschinen GmbH* [1976] ECR 1831, ECJ; Case 25/76 *Galeries Segoura SPRL v Bonakdarian* [1976] ECR 1851, [1977] 1 CMLR 361, ECJ. But in more recent decisions there has been a relaxation of this standard, and it is now possible to dispense with the need to comply with the formalities in a proper case, eg if the insistence by one party on compliance with the formalities would constitute bad faith on his part. Cf Case 71/83 *Partenereederei ms Tilly Russ v Haven und Vervoerbedrijf Nova NV & Goeminne Hout NV* [1984] ECR 2417, [1984] 3 CMLR 499, ECJ; Case 221/84 *Berghoefer GmbH & Co v ASA SA* [1985] ECR 2699, [1986] 1 CMLR 13, ECJ; Case 313/85 *Iveco Fiat SpA v NV Van Hool* [1986] ECR 3337, [1988] 1 CMLR 57, ECJ. See also *Lafarge Plasterboard Ltd v Fritz Peters & Co* [2000] 2 Lloyd's Rep 689. If one party says he had no knowledge of the written clause, but did have the means of knowledge of it, he may be deemed to have known of it, and hence to be bound: Case C-214/89 *Powell Duffryn plc v Petereit* [1992] ECR I-1745, ECJ (jurisdiction agreement in the constitution of a company in which the defendant was a shareholder; the wider application of the decision is uncertain). Best practice is to require the clause, and the assent of the parties to it, to be in written form. In the case of a Luxembourg domiciliary see the Brussels Convention, Annexed Protocol art I; Civil Jurisdiction and Judgments Act 1982 s 2, Sch 1, Annexed Protocol; and Case 784/79 *Porta-Leasing GmbH v Prestige International SA* [1980] ECR 1517, [1981] 1 CMLR 135, ECJ.

If one party to a contract does not object to the jurisdictional forum specified by the other party in a letter of confirmation and invoices, its conduct will be deemed to constitute consent provided the clause is consistent with a practice in force in international trade or commerce of which the parties are, or should be, aware: Case C-106/95 *Mainschiffahrts-Genossenschaft eG v Les Gravières Rhénanes Sarl* [1997] QB 731, [1997] ECR I-911, ECJ. Where a contract contains an exclusive jurisdiction clause, the fact that a party accepts service of proceedings issued in a country other than that specified as having jurisdiction does not prevent that party relying on the clause: *Baghlaf Al Zafer Factory Co BR for Industry Ltd v Pakistan National Shipping Co* [1998] 2 Lloyd's Rep 229, CA. An exclusive jurisdiction clause in an underlying contract must be expressly incorporated into the main contract: *AIG Europe SA v QBE International Insurance Ltd* [2001] 2 All ER (Comm) 622, [2001] 2 Lloyd's Rep 268 (reinsurance contract).

However, such agreements need to be clearly established if they are to be relied on in support of anti-suit injunctions: *Ascot Commodities NV v Northern Pacific Shipping, The Irini A* [1999] 1 Lloyd's Rep 196. See also *AIG Group (UK) Ltd v The Ethniki* [2000] 2 All ER 566, [2000] 1 All ER (Comm) 65, CA (clause of reinsurance contract stating 'wording as original', held not sufficient to incorporate jurisdiction clause from primary insurance policy); and *SSQ Europe SA v Johann & Backes OHG* [2002] 1 Lloyd's Rep 465 (choice of court agreement printed on reverse of supplier's invoice for payment).

16 Case C-214/89 *Powell Duffryn plc v Petereit* [1992] ECR I-1745, ECJ; *I P Metal Ltd v Ruote OZ SpA (No 2)* [1994] 2 Lloyd's Rep 560, CA; *Astilleros Zamakona SA v McKinnons* 2002 SLT 1206, OH. Cf *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701, [1993] 3 All ER 897, CA; *Pacific Resources Corp v Crédit Lyonnais Rouse* (7 October 1994, unreported), CA.

17 Case 150/80 *Elefanten Schuh v Jacqmain* [1981] ECR 1671, [1982] 3 CMLR 1, ECJ; Case C-159/97 *Transporti Castelleti Spedizione Internazionali SpA v Hugo Trumpy SpA* [1999] ECR I-1597, ECJ.

18 Case 25/79 *Sanicentral GmbH v Collin* [1979] ECR 3423, [1980] 2 CMLR 164, ECJ. The courts which have jurisdiction by virtue of a jurisdiction clause validly concluded under the Conventions also have exclusive jurisdiction where the proceedings centre on whether the contract containing the clause is void: Case C-269/95 *Benincasa v Dentalkit Srl* [1997] ECR I-3767, ECJ.

19 Brussels Convention art 17, 5th para; Lugano Convention art 17 para 4. If the clause expressly states that it was for the benefit of one party only, that will suffice: see Case 22/85 *Anterist v Crédit Lyonnais* [1986] ECR 1951, [1987] 1 CMLR 333, ECJ.

20 Brussels Convention art 17, 6th para. The reference in the text to specified courts is a reference to courts specified in art 5 para 1: see para 90 post.

21 Lugano Convention art 17 para 5.

22 See the 'Brussels I' Regulation art 18 para 1; and para 82 post.

23 For the meaning of 'United Kingdom' see para 4 ante. As to the adaptation of the provisions of the Conventions by the Civil Jurisdiction and Judgments Act 1982 Sch 4 (as substituted) to a scheme applying as between parts of the United Kingdom see para 66 ante. As to the interpretation of the scheme by reference to decisions under the Brussels Convention or the 'Brussels I' Regulation see para 70 ante.

24 For the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

25 Ie under the Civil Jurisdiction and Judgments Act 1982 s 16(1) (as amended), Sch 4 (as substituted).

26 Ibid Sch 4 rule 12(1) (Sch 4 substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt II para 4). Note that, unlike its counterpart in the Brussels and Lugano Conventions, this provision does not refer to 'exclusive' jurisdiction. See also *McGowan v Summit at Lloyds* 2002 SLT 1258, (2002) Times, 15 July, IH (the question of whether a jurisdiction clause was exclusive depended upon the law governing the contract and not the Civil Jurisdiction and Judgments Act 1982 Sch 4 art 17 (now Sch 4 rule 12 (Sch 4 as substituted))).

27 Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 12(2) (Sch 4 as substituted: see note 26 supra).

28 Ie ibid Sch 4 rule 9 (Sch 4 as substituted: see note 26 supra): see para 81 text and notes 12-13 post.

29 Ie conferred by ibid Sch 4 rule 11 (Sch 4 as substituted: see note 26 supra): see paras 75-76 ante.

30 Ibid Sch 4 rule 12(3) (Sch 4 as substituted: see note 26 supra). Jurisdiction in matters relating to individual contracts of employment is determined solely in accordance with Sch 4 rule 10 (Sch 4 as substituted): see para 82 post.

UPDATE

79 Jurisdiction derived from a choice of court agreement

TEXT AND NOTES--Note EC Council Decision 2009/397 (OJ L133, 29.5.2009, p 1) approving the signing of the Convention on Choice of Court Agreements (30 June 2005; Hague Conference on Private International Law).

NOTES 1-5--In deciding whether a clause falls within art 23, it is not necessary to consider whether the clause has an international element, but rather what needs to be considered is whether the clause in question meets the formal requirements of art 23: *British Sugar plc v Fratelli Babbini di Lionello Babbini & CSAS* [2004] EWHC 2560 (TCC), [2005] 1 All ER (Comm) 55.

NOTE 4--The court seised must apply its own conflict rules to determine whether to stay proceedings brought in contravention of an exclusive jurisdiction agreement in favour of a court which is a non-Regulation state or a non-contracting state: *Konkola Copper*

Mines plc v Coromin [2005] EWHC 898 (Comm), [2005] 2 All ER (Comm) 637; affirmed [2006] EWCA Civ 5, [2006] 1 All ER (Comm) 437.

NOTE 10--See also *Deutsche Bank AG v Asia Pacific Broadband Wireless Communications* [2008] EWCA Civ 1091, [2009] 2 All ER (Comm) 129 (consensus reached on jurisdiction clause in agreement).

NOTE 15--See also *7E Communications Ltd v Vertex Antennentechnik GmbH* [2007] EWCA Civ 140, [2007] 2 All ER (Comm) 798; *Polskie Ratownictwo Okretowe v Rallo Vito & C SNC* [2009] EWHC 2249 (Comm), [2010] 1 Lloyd's Rep 384, [2009] All ER (D) 80 (Sep).

NOTE 16--See also *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] EWCA Civ 389, [2006] 2 All ER (Comm) 385; *Andromeda Marine SA v OW Bunker & Trading A/S* [2006] EWHC 777 (Comm), [2006] 2 All ER (Comm) 331; and *Knorr-Bremse Systems for Commercial Vehicles Ltd v Haldex Brake Products GmbH* [2008] EWHC 156 (Pat), [2008] FSR 752, [2008] All ER (D) 97 (Feb) (unless third party succeeded to rights and obligations of original contracting party, necessary to ascertain whether actually accepted jurisdiction clause).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/ (iv) Jurisdiction in cases of certain Contracts/80. Insurance contracts.

(iv) Jurisdiction in cases of certain Contracts

80. Insurance contracts.

Jurisdiction under the 'Brussels I' Regulation and the Brussels and Lugano Conventions in matters relating to insurance is determined according to a separate scheme contained in the Regulation and the Conventions, as described below¹. A judgment must not be recognised if it conflicts with the provisions of the scheme².

Actions against an insurer domiciled in a Regulation state or a contracting state³ may be brought where the insurer is domiciled⁴, or in the Regulation state or contracting state in which the policyholder is domiciled⁵, or (if the insurer is a co-insurer) where proceedings are being brought against the leading insurer⁶. Additionally, the insurer may be sued in the courts for the place where the harmful event occurred in the case of liability insurance or insurance of immovable property, or if movable and immovable property are covered by the same policy and both are adversely affected by the same contingency⁷.

In respect of liability insurance, if the law of the court permits it, the insurer may be joined in proceedings which the injured party has brought against the insured⁸.

An insurer not domiciled in a Regulation state or contracting state is nevertheless deemed to be so domiciled if the dispute arises out of the operations of a branch or agency in a Regulation state or contracting state⁹.

An action may be brought by an insurer only in the courts of the Regulation state or contracting state in which the defendant is domiciled, whether he is the policyholder, the insured or the beneficiary¹⁰.

The provisions of the scheme described above may be departed from by agreement¹¹ only if the agreement:

- 16 (1) is entered into after the dispute has arisen¹²;
- 17 (2) allows the policyholder, the insured or the beneficiary to bring proceedings in courts other than those indicated above¹³;
- 18 (3) is concluded between a policyholder and an insurer both of whom are at that time domiciled or habitually resident in the same Regulation state or contracting state, and confers jurisdiction on the courts of that state even if the harmful event were to occur abroad, provided that the agreement is not contrary to the law of the state¹⁴;
- 19 (4) is concluded with a policyholder who is not domiciled in a Regulation state or contracting state, except in so far as the insurance is compulsory or relates to immovable property in a Regulation state or contracting state¹⁵; or
- 20 (5) relates to a contract of insurance covering one or more of the following risks¹⁶:

1

1. (a) any loss of or damage to: (i) sea-going ships, installations situated offshore or on the high seas, or aircraft, arising from perils relating to their use for commercial purposes; or (ii) goods in transit, other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft¹⁷;

2. (b) any liability (other than for bodily injury to passengers or loss of or damage to their baggage): (i) arising out of the use or operation of such ships, installations or aircraft in so far as the law of the Regulation state or contracting state in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks; or (ii) for loss or damage as described in head (a) above¹⁸;
3. (c) any financial loss connected with the use or operation of ships, installations or aircraft, in particular loss of freight or charter hire¹⁹;
4. (d) any risk or interest connected with any of those referred to in heads (a) to (c) above²⁰;
5. (e) notwithstanding the risks referred to in heads (a) to (d) above, and under the 'Brussels I' Regulation only, all 'large risks' as defined in the EC Council Directive 73/239 on the co-ordination of laws etc relating to the taking-up and pursuit of the business of direct insurance other than life assurance²¹.

2

1 'Brussels I' Regulation art 8; Brussels Convention art 7; Lugano Convention art 7. The scheme is comprised in Section 3 (arts 8-14) of the 'Brussels I' Regulation and Section 3 (arts 7-12A) of each of the Conventions. The restrictions imposed by the Regulation and the Conventions will not be applicable if the defendant enters an appearance in the courts of the contracting state in which he is sued: see para 78 ante. Neither do they apply if art 4 or art 5 para 5 of the 'Brussels I' Regulation or art 4 or art 5 para 5 of the Conventions (see note 9 infra; and paras 88, 92 post) applies to give the court jurisdiction: 'Brussels I' Regulation art 8; Brussels Convention art 7; Lugano Convention art 7. See, however, the text to note 11 infra. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. As to references to numbered articles of the Conventions see para 65 note 8 ante.

The provisions of the Brussels Convention do not apply to contracts of reinsurance: Case C-412/98 *Universal General Insurance Co (UGIC) v Group Josi Reinsurance Co SA* [2001] QB 68, [2000] 2 All ER (Comm) 467, ECJ. Cf the report by Professor Peter Schlosser on the Accession Convention (OJ C59, 5.3.79, p 71 at 117); C-351/89 *Overseas Union Insurance Ltd v New Hampshire Insurance Co* [1991] ECR I-3317; *New Hampshire Insurance Co v Strabag Bau AG* [1992] 1 Lloyd's Rep 361, CA (where the point was not decided); *Trade Indemnity plc v Forsäkringsaktiebolaget Njord (in liquidation)* [1995] 1 All ER 796 at 804. See also *Agnew v Lansförsäkringsbolagens AB* [2001] 1 AC 223, [2000] 1 All ER 737, HL ('matters relating to insurance' in Section 3 of the Lugano Convention does not include reinsurance).

2 'Brussels I' Regulation art 35 para 1; Brussels Convention art 28, 1st para; Lugano Convention art 28, 1st para. As to refusal of recognition generally under the 'Brussels I' Regulation art 35 and under art 28 of the Conventions see para 188 post.

3 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

4 'Brussels I' Regulation art 9 para 1(a); Brussels Convention art 8 para 1; Lugano Convention art 8 para 1. As to domicile for these purposes see para 83 et seq post.

5 'Brussels I' Regulation art 9 para 1(b); Brussels Convention art 8 para 2; Lugano Convention art 8 para 2.

6 'Brussels I' Regulation art 9 para 1(c); Brussels Convention art 8 para 3; Lugano Convention art 8 para 3.

7 'Brussels I' Regulation art 10; Brussels Convention art 9; Lugano Convention art 9.

8 'Brussels I' Regulation art 11 para 1; Brussels Convention art 10, 1st para; Lugano Convention art 10, 1st para. In such a case, the provisions of arts 8-10 of the 'Brussels I' Regulation and arts 7-9 of the Conventions (see the text and notes 4-7 supra, 9 infra) apply to such actions: 'Brussels I' Regulation art 11 para 2; Brussels Convention art 10, 2nd para; Lugano Convention art 10, 2nd para. If the law governing direct actions provides that the policyholder or the insured may be joined, the same court has jurisdiction over them: 'Brussels I' Regulation art 11 para 3; Brussels Convention art 10, 3rd para; Lugano Convention art 10, 3rd para. As to the importance of the distinction between the terms 'insured', 'policyholder' and 'beneficiary' see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 367-368.

9 'Brussels I' Regulation art 9 para 2; Brussels Convention art 8; Lugano Convention art 8. Note that any party domiciled in a contracting state may be sued in another Regulation state or contracting state if it has a branch, agency or other establishment there, out of the operations of which the dispute has arisen: see the 'Brussels I' Regulation art 5 para 5; the Brussels Convention art 5 para 5; the Lugano Convention art 5 para 5; and para 92 post. Further, a counterclaim may always be brought in the court in which the main proceedings

are pending: see 'Brussels I' Regulation art 6 para 3; art 6 para 3 of the Conventions; and para 93 post. For the purpose of such proceedings, a person is treated as domiciled in the part of the United Kingdom in which the branch, agency or establishment, out of whose operations the proceedings arose, is situated: Civil Jurisdiction and Judgments Act 1982 s 44(1)(a), (2) (amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 2 para 19); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 paras 11(1)(a), (2). For the meaning of 'United Kingdom' see para 4 ante.

10 'Brussels I' Regulation art 12 para 1; Brussels Convention art 11, 1st para; Lugano Convention art 11, 1st para. This provision is expressed to be without prejudice to art 11 para 3 (in the case of the Regulation) and art 10, 3rd para (in the case of the Conventions) (see note 8 supra). See also note 1 supra. There is no inherent limitation on the Brussels Convention art 11, which applies to any insurer, wherever domiciled, who wants to bring proceedings against a defendant domiciled in a contracting state: *Jordan Grand Prix Ltd v Baltic Insurance Group, Baltic Insurance Group v Jordan Grand Prix Ltd* [1999] 2 AC 127, [1999] 1 All ER 289, HL.

This provision of the Regulation and Conventions does not, however, affect the right to bring a counterclaim in the court in which the original claim is pending: 'Brussels I' Regulation art 12 para 2; Brussels Convention art 11, 2nd para; Lugano Convention art 11, 2nd para. As to the right to bring counterclaims see note 9 supra; and para 93 post. See also *New Hampshire Insurance Co v Strabag Bau AG* [1992] 1 Lloyd's Rep 361, CA; and *Jordan Grand Prix* supra (the right to make a counterclaim does not include a right to add new parties on the counterclaim).

11 'Brussels I' Regulation art 13; Brussels Convention art 12; Lugano Convention art 12. As to the effect of agreements of this nature generally, known as 'choice of court agreements', see further para 79 ante.

12 'Brussels I' Regulation art 13 para 1; Brussels Convention art 12 para 1; Lugano Convention art 12 para 1.

13 'Brussels I' Regulation art 13 para 2; Brussels Convention art 12 para 2; Lugano Convention art 12 para 2.

14 'Brussels I' Regulation art 13 para 3; Brussels Convention art 12 para 3; Lugano Convention art 12 para 3.

15 'Brussels I' Regulation art 13 para 4; Brussels Convention art 12 para 4; Lugano Convention art 12 para 4.

16 'Brussels I' Regulation art 13 para 5; Brussels Convention art 12 para 5; Lugano Convention art 12 para 5.

17 'Brussels I' Regulation art 14 para 1; Brussels Convention art 12A para 1; Lugano Convention art 12A para 1.

18 'Brussels I' Regulation art 14 para 2; Brussels Convention art 12A para 2; Lugano Convention art 12A para 2.

19 'Brussels I' Regulation art 14 para 3; Brussels Convention art 12A para 3; Lugano Convention art 12A para 3.

20 'Brussels I' Regulation art 14 para 4; Brussels Convention art 12A para 4; Lugano Convention art 12A para 4.

21 'Brussels I' Regulation art 14 para 5. The Directive referred to in the text is EC Council Directive 73/239 on the co-ordination of laws etc relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ L228, 16.8.73, p 3) (amended by EC Council Directive 88/357 (OJ L172, 4.7.88, p 1); EC Council Directive 90/618 (OJ L330, 29.11.90, p 44); EC Council Directive 2000/26 (OJ L181, 20.7.2000, p 65)).

UPDATE

80 Insurance contracts

NOTE 1--See also *Youell v La Réunion Aérienne* [2008] EWHC 2493 (Comm), [2009] 1 All ER (Comm) 301 (clear that European Court of Justice unlikely to regard claim by one co-insurer against another brought by former as assignee of insured's rights against latter as falling within 'Brussels I' Regulation art 3) (affirmed on different point [2009] EWCA Civ 175, [2009] Bus LR 1504, [2009] All ER (D) 112 (Mar) (see PARA 74)).

NOTE 8--The reference in the 'Brussels I' Regulation art 11(2) to art 9(1)(b) is interpreted as meaning that a social security institution, acting as the statutory assignee of the rights of the directly injured party in a motor accident, cannot bring an action directly before the courts of its member state of establishment against the

insurer of the person allegedly responsible for the accident, where that insurer is established in another member state: Case C-347/08 *Vorarlberger Gebietskrankenkasse v WGV-Schwäbische Allgemeine Versicherungs AG* [2010] All ER (Comm) 603, ECJ.

NOTE 21--EC Council Directives 88/357, 2000/26 amended: European Parliament and EC Council Directive 2005/14 (OJ L149, 11.6.2005, p 14).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/ (iv) Jurisdiction in cases of certain Contracts/81. Certain consumer contracts.

81. Certain consumer contracts.

Jurisdiction under the 'Brussels I' Regulation and the Brussels and Lugano Conventions in matters relating to consumer contracts is determined according to a separate scheme contained in the 'Regulation and the Conventions, as described below¹. A judgment must not be recognised if it conflicts with the provisions of the scheme². Jurisdiction as between different parts of the United Kingdom in matters relating to consumer contracts is determined according to a similar scheme³.

In proceedings concerning a contract made by a consumer⁴ jurisdiction is determined by the scheme if the contract is:

- 21 (1) a contract for the sale of goods on instalment credit terms⁵; or
- 22 (2) a contract for a loan repayable by instalments, or for any other form of credit, to finance the sale of goods⁶; or
- 23 (3) any other contract for the supply of goods, or for the supply of services, and:
 - 3 6. (a) in relation to the Conventions, in the state of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to the consumer, or by advertising, and the consumer took in that state the steps necessary to conclude the contract⁷; or
 7. (b) in relation to the Regulation, the contract is concluded with a person who pursues commercial or professional activities in the member state of the consumer's domicile or, by any means, directs such activities to that member state or to several states including that member state, and the contract falls within the scope of such activities⁸; or
 8. (c) within the United Kingdom, the contract is concluded with a person who pursues commercial or professional activities in the part of the United Kingdom in which the consumer is domiciled or, by any means, directs such activities to that part or to other parts of the United Kingdom including that part, and the contract falls within the scope of such activities⁹.

4

A consumer may bring proceedings in the Regulation state or contracting state or, as the case may be, the part of the United Kingdom, in which he is domiciled or in the Regulation state or contracting state in which the other party to the contract is domiciled¹⁰; but that other party may bring proceedings only in the Regulation state or contracting state in which the consumer is domiciled¹¹.

The provisions described above may be departed from only by an agreement¹² which:

- 24 (i) is entered into after the dispute has arisen; or
- 25 (ii) allows the consumer to bring proceedings in courts other than those indicated above; or
- 26 (iii) is entered into by the consumer and the other party, both of whom are at the time domiciled or habitually resident in the same Regulation state or contracting state or, as the case may be, the same part of the United Kingdom, and confers

jurisdiction on the courts of that state or part, provided that such an agreement is not contrary to the law of that state or part¹³.

1 See the 'Brussels I' Regulation art 15 para 1; the Brussels Convention art 13; and the Lugano Convention art 13. The scheme is comprised in Section 4 (arts 15-17) of the 'Brussels I' Regulation and Section 4 (arts 13-15) of each of the Conventions. The restrictions imposed by the Regulation and the Conventions will not be applicable if the defendant enters an appearance in the courts of the contracting state in which he is sued: see para 78 ante. Neither do they apply if art 4 or art 5 para 5 of the Regulation or art 4 or art 5 para 5 of the Conventions (see paras 88, 92 post) applies to give the court jurisdiction: 'Brussels I' Regulation art 15 para 1; Brussels Convention art 13; Lugano Convention art 13. See, however, art 17 of the Regulation and art 15 of the Conventions; and the text to notes 12-13 infra. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. As to references to numbered articles of the Conventions see para 65 note 8 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

The code is inapplicable to contracts of transport: 'Brussels I' Regulation art 15 para 3; Brussels Convention art 13; Lugano Convention art 13. However, under the 'Brussels I' Regulation only, it does apply to a contract of transport that provides a combination of travel and accommodation for an inclusive price: art 15 para 3.

2 'Brussels I' Regulation art 35 para 1; Brussels Convention art 28, 1st para; Lugano Convention art 28, 1st para. As to refusal of recognition generally under the Regulation art 35 and under art 28 of the Conventions see para 188 post.

3 See the Civil Jurisdiction and Judgments Act 1982 s 16(1), Sch 4 rule 7 (s 16(1) amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt II para 3(a); and the Civil Jurisdiction and Judgments Act 1982 Sch 4 substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt II para 4). The scheme, which is comprised in Section 4 (rules 7-9) of the Civil Jurisdiction and Judgments Act 1982 Sch 4 (as substituted), does not apply to contracts of transport or insurance: Sch 4 rule 7(2) (Sch 4 as so substituted). The scheme does not apply if the defendant enters an appearance (see para 78 ante), and applies subject to Sch 4 rule 3(e), (h)(ii) (Sch 4 as substituted) (see para 92 post): Sch 4 rule 7 (Sch 4 as so substituted). For the meaning of 'United Kingdom' see para 4 ante.

4 'Consumer' means someone who concludes a contract for a purpose which can be regarded as being outside his trade or profession: 'Brussels I' Regulation art 15 para 1; Brussels Convention art 13; Lugano Convention art 13. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 7(1) (Sch 4 as substituted: see note 3 supra); and see Case 150/77 *Société Bertrand v Paul Ott KG* [1978] ECR 1431, ECJ. It is not clear whether it is a requirement that the other party to the contract makes the contract in the course of his business, but it is established that a non-consumer assignee of the consumer's contractual rights is not entitled to the privileges of these rules: Case C-89/91 *Shearson Lehmann Hutton Inc v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* [1993] ECR I-139, ECJ. See also Case C-269/95 *Francesco Benincasa v Dentalkit Srl* [1998] All ER (EC) 135, ECJ (consumer who concluded a contract with a view to, and with the purpose of, pursuing a trade or profession in the future is not a consumer for the purposes of the Brussels Convention arts 13, 14).

5 'Brussels I' Regulation art 15 para 1(a); Brussels Convention art 13 para 1; Lugano Convention art 13 para 1. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 7(1)(a) (Sch 4 as substituted: see note 3 supra).

6 'Brussels I' Regulation art 15 para 1(b); Brussels Convention art 13 para 2; Lugano Convention art 13 para 2. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 7(1)(b) (Sch 4 as substituted: see note 3 supra).

7 Brussels Convention art 13 para 3; Lugano Convention art 13 para 3. When determining whether the Brussels Convention art 13 applies, 'specific invitation' is to be interpreted in a natural and common sense manner: *Standard Bank London Ltd v Apostolakis* [2001] Lloyd's Rep Bank 240 (use of financial adviser to promote trading agreement constituted a specific invitation). The Convention looks for initial steps that amount to a solicitation of business coming to the individual or company located within the jurisdiction: *Rayner v Davies* [2002] 1 All ER (Comm) 620 (where a service was solicited by the consumer, a faxed offer made by the service provider in response to the consumer's approach did not constitute the marketing of his services in the jurisdiction).

8 'Brussels I' Regulation art 15 para 1(c).

9 Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 7(1)(c) (Sch 4 as substituted: see note 3 supra).

10 'Brussels I' Regulation art 16 para 1; Brussels Convention art 14, 1st para; Lugano Convention art 14, 1st para. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 8(1) (Sch 4 as substituted: see note 3 supra).

supra). Under the Regulation or Conventions, when a consumer enters into a contract with a party who is not domiciled in a Regulation state or a contracting state but has a branch, agency or other establishment in a Regulation state or a contracting state, then if the dispute arises out of the operations of that branch, agency or establishment, that party is deemed to be domiciled in that state: 'Brussels I' Regulation art 15 para 2; Brussels Convention art 13; Lugano Convention art 13. For the purpose of such proceedings, a person is treated as domiciled in the part of the United Kingdom in which the branch, agency or establishment, out of whose operations the proceedings arose, is situated: Civil Jurisdiction and Judgments Act 1982 s 44(1)(b), (2) (s 44(1)(b), (2) amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 2 para 19); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 paras 11(1)(b), (2). Any proceedings brought in the United Kingdom by a consumer on the ground that he is domiciled there must be brought in the part of the United Kingdom in which he is domiciled: Civil Jurisdiction and Judgments Act 1982 s 10(3); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 7(3).

A consumer does not have the right to bring proceedings in the courts of the contracting state in which he is domiciled unless the other party is also domiciled, or deemed to be so, in a contracting state: Case C-318/93 *Brenner v Dean Witter Reynolds Inc* [1994] ECR I-4275, [1995] All ER (EC) 278, ECJ.

Note that any party domiciled in a Regulation state or contracting state (or part of the United Kingdom) may be sued in another Regulation state or contracting state (or part) if it has a branch, agency or other establishment there, out of the operations of which the dispute has arisen: 'Brussels I' Regulation art 5 para 5; Brussels Convention art 5 para 5; Lugano Convention art 5 para 5. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 3(e) (Sch 4 as substituted: see note 3 supra). Further, a counterclaim may always be brought in the court in which the main proceedings are pending: see the 'Brussels I' Regulation art 16 para 3; and art 14, 3rd para of the Conventions; the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 8(3) (Sch 4 as substituted); and para 93 post.

11 'Brussels I' Regulation art 16 para 2; Brussels Convention art 14, 2nd para; Lugano Convention art 14, 2nd para. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 8(2) (Sch 4 as substituted: see note 3 supra).

12 As to the effect of agreements of this nature generally, known as 'choice of court agreements', see further para 79 ante.

13 'Brussels I' Regulation art 17; Brussels Convention art 15; Lugano Convention art 15. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 9 (Sch 4 as substituted: see note 3 supra). See further para 79 ante.

UPDATE

81 Certain consumer contracts

NOTE 4--A person who concludes a contract for purposes which are part within and part outside his trade or profession cannot rely on the exceptional protection afforded to consumer contracts unless the proportion of trade or professional usage is negligible: Case C-464/01 *Gruber v BayWa AG* [2006] 2 WLR 205, ECJ.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/ (iv) Jurisdiction in cases of certain Contracts/82. Individual contracts of employment.

82. Individual contracts of employment.

Jurisdiction under the 'Brussels I' Regulation in matters relating to individual contracts of employment¹ is determined according to a separate scheme contained in the Regulation, as described below². Jurisdiction as between different parts of the United Kingdom in matters relating to individual contracts of employment is determined according to a similar scheme³.

Actions against an employer domiciled in a Regulation state⁴ (or in any part of the United Kingdom) may be brought where the employer is domiciled⁵, or in the Regulation state (or in that part of the United Kingdom) in which the employee habitually carries out his work or in the courts for the last place where he did so⁶, or (if the employee does not or did not habitually carry out his work in any one country), in the courts for the place (or in that part of the United Kingdom) where the business which engaged the employee is or was situated⁷. An employer not domiciled in a Regulation state is nevertheless deemed to be so domiciled if the dispute arises out of the operations of a branch or agency in a Regulation state⁸.

However, an employer may bring proceedings only in the Regulation state in which the employee is domiciled⁹.

The provisions of the scheme described above may be departed from by agreement¹⁰ only if the agreement: (1) is entered into after the dispute has arisen¹¹; or (2) allows the employee to bring proceedings in courts other than those indicated in the scheme¹².

1 As to analogous provisions contained in the Brussels and Lugano Conventions see para 90 post.

2 'Brussels I' Regulation art 18 para 1. The scheme is comprised in Section 5 (arts 18-21) of the 'Brussels I' Regulation. The restrictions imposed by the Regulation and the Conventions will not be applicable if the defendant enters an appearance in the courts of the Regulation state in which he is sued: see para 78 ante. For the meaning of 'Regulation state' see para 65 note 6 ante. Nor do they apply if either art 4 or art 5 para 5 of the Regulation (see paras 88, 92 post) gives the court jurisdiction: art 18 para 1. See also art 21; and the text to notes 10-12 infra. As to the 'Brussels I' Regulation see para 65 note 1 ante.

3 See the Civil Jurisdiction and Judgments Act 1982 s 16(1), Sch 4 rule 10(1) (s 16(1) amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt II para 3(a); and the Civil Jurisdiction and Judgments Act 1982 Sch 4 substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt II para 4). The scheme, which is comprised in the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 10 (Sch 4 as substituted), does not apply if the defendant enters an appearance (see para 78 ante), and applies subject to Sch 4 rule 3(e) (Sch 4 as substituted) (see para 92 post): Sch 4 rule 10 (Sch 4 as so substituted). For the meaning of 'United Kingdom' see para 4 ante.

4 For the meaning of 'Regulation state' see note 2 supra.

5 'Brussels I' Regulation art 19 para 1. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 10(2) (a) (Sch 4 as substituted: see note 3 supra).

6 'Brussels I' Regulation art 19 para 2(a). See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 10(2)(b) (Sch 4 as substituted: see note 3 supra).

7 'Brussels I' Regulation art 19 para 2(b). See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 10(2)(c) (Sch 4 as substituted: see note 3 supra). As to analogous provisions under the Brussels and Lugano Conventions see para 90 text and notes 17-18 post.

8 'Brussels I' Regulation art 18 para 2. For the purpose of such proceedings, a person is treated as domiciled in the part of the United Kingdom in which the branch, agency or establishment, out of whose operations the

proceedings arose, is situated: Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 paras 11(1)(c), (2).

9 'Brussels I' Regulation art 20 para 1. These provisions of this scheme do not affect the right to bring a counterclaim in the court in which, in accordance with the scheme, the original claim is pending: art 20 para 2. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 10(4) (Sch 4 as substituted: see note 3 supra).

10 'Brussels I' Regulation art 21. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 10(5) (Sch 4 as substituted: see note 3 supra). As to the effect of agreements of this nature generally, known as 'choice of court agreements', see further para 79 ante.

11 'Brussels I' Regulation art 21 para 1. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 10(5)(a) (Sch 4 as substituted: see note 3 supra).

12 'Brussels I' Regulation art 21 para 2. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 10(5)(b) (Sch 4 as substituted: see note 3 supra). See further para 79 ante.

UPDATE

82 Individual contracts of employment

NOTE 9--See *Swithenbank Foods Ltd v Bowers* [2002] EWHC 2257 (QB), [2002] 2 All ER (Comm) 974 (employee domiciled in France; English courts had no jurisdiction over claim brought by employer in England).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/ (v) Jurisdiction based on Domicile/A. DOMICILE IN A REGULATION STATE OR IN A CONTRACTING STATE/83. Defendant domiciled in a Regulation state or in a contracting state.

(v) Jurisdiction based on Domicile

A. DOMICILE IN A REGULATION STATE OR IN A CONTRACTING STATE

83. Defendant domiciled in a Regulation state or in a contracting state.

Subject to certain provisions discussed elsewhere in this title¹, persons domiciled in a Regulation state or a contracting state² must, whatever their nationality, be sued in the courts of that state³, and persons who are not nationals of the state in which they are domiciled are governed by rules of jurisdiction applicable to nationals of that state⁴. As regards the determination of jurisdiction within the United Kingdom⁵, persons domiciled in a part of the United Kingdom⁶ must be sued in the courts of that part⁷.

In order to determine whether a person is domiciled in the Regulation state or contracting state whose courts are seised of a matter, the court must apply its internal law; if a party is not domiciled in the state whose courts are so seised, then in order to determine whether he is domiciled in another Regulation state or contracting state, the court must apply the law of that state⁸.

The seat of a company⁹, or other legal person or association of natural or legal persons, is treated as its domicile and is ascertained by applying the private international law of the court seised¹⁰. In order to determine whether a trust is domiciled in the contracting state whose courts are seised, the court must apply its rules of private international law¹¹.

Persons domiciled in a Regulation state or contracting state may be sued in the courts of another Regulation state or contracting state only by virtue of the rules of the 'Brussels I' Regulation or the Brussels or Lugano Conventions¹². Similarly, persons domiciled in a part of the United Kingdom may be sued in the courts of another part of the United Kingdom only by virtue of the scheme for determining jurisdiction between parts of the United Kingdom¹³.

1 See paras 75-82 ante, 88-93, 127-128 post.

2 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

3 'Brussels I' Regulation art 2 para 1; Brussels Convention art 2, 1st para; Lugano Convention art 2, 1st para. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

4 'Brussels I' Regulation art 2 para 2; Brussels Convention art 2, 2nd para; Lugano Convention art 2, 2nd para. This represents the basic principle of the Regulation and Conventions, namely that a defendant is entitled to defend himself in his home courts; exceptions to it are, for that reason at least, accorded a restricted or narrow interpretation. See in particular Case 220/88 *Dumez France SA v Hessische Landesbank* [1990] ECR I-49, ECJ; Case C-89/91 *Shearson Lehmann Hutton Inc v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* [1993] ECR I-139, ECJ. A construction of a provision in the Conventions which would allow the claimant to sue in his home courts will be particularly carefully scrutinised: Case C-68/93 *Shevill v Presse Alliance SA* [1995] 2 AC 18, [1995] ECR I-415, ECJ; Case C-364/93 *Marinari v Lloyd's Bank plc (Zubaidi Trading Co intervening)* [1995] ECR I-2719, [1996] QB 217, ECJ. On the question of who is the defendant being sued see *The Deichland* [1990] 1 QB 361, CA; *The Anna H* [1995] 1 Lloyd's Rep 11, CA.

5 For the meaning of 'United Kingdom' see para 4 ante.

6 For the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

7 Civil Jurisdiction and Judgments Act 1982 s 16(1), Sch 4 rule 1 (s 16(1) amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt II para 3(a); and the Civil Jurisdiction and Judgments Act 1982 Sch 4 substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt II para 4). As to the adaptation of the provisions of the Conventions by the Civil Jurisdiction and Judgments Act 1982 Sch 4 (as substituted) to a scheme applying as between parts of the United Kingdom see para 66 ante. As to the interpretation of the scheme by reference to decisions under the Brussels Convention or the 'Brussels I' Regulation see para 70 ante.

8 'Brussels I' Regulation art 59 paras 1, 2; Brussels Convention art 52; Lugano Convention art 52. As to the law to be applied in the United Kingdom see para 84 post.

9 In the case of the 'Brussels I' Regulation, this is extended to mean its statutory seat or its central administration or its principal place of business ('Brussels I' Regulation art 60 para 1(a)-(c)); and 'statutory seat' is defined (for the purposes of the United Kingdom and Ireland) as the registered office or (where there is no such office anywhere) the place of incorporation, or (where there is no such place anywhere) the place under the law of which the formation took place: art 60 para 2.

10 Ie as distinct from the law of the contracting state in which it is supposed that the company or other legal person has its domicile: 'Brussels I' Regulation art 60 para 1; Brussels Convention art 53, 1st para; Lugano Convention art 53, 1st para. As to the law to be applied in the United Kingdom see para 85 post. As to the domicile of the Crown see para 87 post.

11 'Brussels I' Regulation art 60 para 3; Brussels Convention art 53, 2nd para; Lugano Convention art 53, 2nd para. As to the law to be applied in the United Kingdom see para 86 post.

12 Ie the rules set out in Sections 2-7 (arts 5-24) of the 'Brussels I' Regulation and Sections 2-6 (arts 5-18) of the Conventions: 'Brussels I' Regulation art 3 para 1; Brussels Convention art 3; Lugano Convention art 3. The following rules of national jurisdiction, which otherwise enable jurisdiction in the United Kingdom to be assumed over a defendant domiciled in another contracting state, are inapplicable: (1) rules which enable jurisdiction to be founded on service of process on the defendant during temporary presence in the United Kingdom (the 'Brussels I' Regulation and the Conventions refer to the document instituting the proceedings having been served on the defendant); or (2) rules which enable jurisdiction to be founded on the presence within the United Kingdom of property belonging to the defendant; or (3) rules which enable jurisdiction to be founded on the seizure by the claimant of property situated in the United Kingdom: see the 'Brussels I' Regulation art 3 para 2 and Annex I; the Brussels Convention art 3; and the Lugano Convention art 3.

13 Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 2 (Sch 4 as substituted: see note 7 supra). The scheme is contained in Sch 4 rules 3-13 (Sch 4 as substituted).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/ (v) Jurisdiction based on Domicile/B. DOMICILE IN THE UNITED KINGDOM/84. Individuals.

B. DOMICILE IN THE UNITED KINGDOM

84. Individuals.

Subject to certain provisions of the 'Brussels I' Regulation and the Brussels and Lugano Conventions¹, an individual is domiciled in the United Kingdom² if he is resident in the United Kingdom, and the nature and circumstances of his residence indicate that he has a substantial connection with the United Kingdom³. Similarly, an individual is resident in a particular part of the United Kingdom⁴ if he is resident there, and the nature and circumstances of his residence indicate that he has a substantial connection with that part⁵. An individual is domiciled in a particular place in the United Kingdom if, and only if, he is domiciled in the part of the United Kingdom in which that place is situated, and he is resident in that place⁶.

1 le subject to art 59 of the 'Brussels I' Regulation and art 52 of the Conventions: see para 83 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. As to references to numbered articles of the Conventions see para 65 note 8 ante.

2 For the meaning of 'United Kingdom' see para 4 ante.

3 Civil Jurisdiction and Judgments Act 1982 s 41(1), (2) (s 41(1) amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 2 para 16); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 paras 9(1), (2). The requirement as to substantial connection is presumed to be fulfilled, unless the contrary is proved, if the individual has been resident in the United Kingdom for at least three months: Civil Jurisdiction and Judgments Act 1982 s 41(6); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 9(6).

4 For the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

5 Civil Jurisdiction and Judgments Act 1982 s 41(3); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 9(3). If the requirements as to a substantial connection with a particular part of the United Kingdom are not satisfied, he is treated as domiciled in the part of the United Kingdom in which he is resident: Civil Jurisdiction and Judgments Act 1982 s 41(5); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 9(5). The presumption contained in the Civil Jurisdiction and Judgments Act 1982 s 41(6) (see note 3 supra) also applies to s 41(3) as the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 9(6) (see note 3 supra) also applies to para 9(3). 'Resident' is given its natural meaning: *Bank of Dubai Ltd v Abbas* [1997] IL Pr 308, CA. It is possible to be resident in the United Kingdom but to lack a substantial connection: *Petrotrade Inc v Smith* [1998] 2 All ER 346, [1999] 1 WLR 457.

6 Civil Jurisdiction and Judgments Act 1982 s 41(4); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 9(4).

UPDATE

84 Individuals

NOTE 3--Owning residential property which is kept ready for use does not equate to having residence: *High Tech International AG v Deripaska* [2006] EWHC 3276 (QB), [2007] EMLR 449.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/ (v) Jurisdiction based on Domicile/B. DOMICILE IN THE UNITED KINGDOM/85. Corporations and associations.

85. Corporations and associations.

For the purposes of the Brussels and Lugano Conventions¹ and the Civil Jurisdiction and Judgments Act 1982, the seat of a corporation or association is to be treated as its domicile².

A corporation or association has its seat in the United Kingdom³ if, and only if, it was incorporated or formed under the law of a part of the United Kingdom⁴ and has its registered office or some other official address⁵ in the United Kingdom, or its central management and control are exercised in that part⁶. It has its seat in a particular part of the United Kingdom if and only if it has its seat in the United Kingdom and:

- 27 (1) it has its registered office or some other official address in that part; or
- 28 (2) its central management and control are exercised in that part; or
- 29 (3) it has a place of business⁷ in that part⁸.

It has its seat in a particular place in the United Kingdom if, and only if, it has its seat in the part of the United Kingdom in which that place is situated, and:

- 30 (a) it has its registered office or some other official address in that place; or
- 31 (b) its central management and control are exercised in that place; or
- 32 (c) it has a place of business in that place⁹.

A corporation or association has its seat in a state other than the United Kingdom if, and only if, it was incorporated or formed under the law of that state and has its registered office or some other official address there, or its central management and control are exercised in that state¹⁰. However, it is not regarded as having its seat in a contracting state other than the United Kingdom if it is shown that the courts of that state would not regard it as having its seat there¹¹.

For the purposes of the provisions of the 'Brussels I' Regulation and the Conventions¹² which confer exclusive jurisdiction over proceedings having as their object the validity of the constitution, the nullity or the dissolution of companies (or other legal persons or associations of natural or legal persons), or the decisions of their organs¹³, a company, legal person or association has its seat in the United Kingdom if, and only if, it was incorporated or formed under the law of a part of the United Kingdom and its central management and control are exercised in the United Kingdom¹⁴. For these purposes, it has its seat in a contracting state other than the United Kingdom if, and only if, it was formed or incorporated under the law of that state, or its central management and control are exercised in that state¹⁵. For the purpose of the Conventions, a corporation or association has its seat in a particular part of the United Kingdom if, and only if, it has its seat in the United Kingdom and it was incorporated or formed under the law of that part¹⁶, or, being incorporated or formed under the law of a state other than the United Kingdom, its central management and control are exercised in that part¹⁷.

1 le for the purposes of art 53 of the Conventions: see para 83 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. As to references to numbered articles of the Conventions see para 65 note 8 ante. Certain other provisions apply in relation to art 16 para 2 of the Conventions: see the text and notes 12-17 infra.

2 Civil Jurisdiction and Judgments Act 1982 42(1), (2) (s 42(2) amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 2 para 17). Certain other provisions apply in relation to the Civil Jurisdiction and Judgments Act 1982 Sch 4 rules 4, 11(b) (Sch 4 as substituted): see the text and notes 12-17 *infra*. As to the rules on domicile and the seat of a corporation under the 'Brussels I' Regulation, the Brussels Convention and the Lugano Convention see para 83 notes 9-11 *ante*.

3 For the meaning of 'United Kingdom' see para 4 *ante*.

4 For the meaning of 'part of the United Kingdom' see para 66 note 3 *ante*.

5 'Official address', in relation to a corporation or association, means an address which it is required by law to register, notify or maintain for the purpose of receiving notices or other communications: Civil Jurisdiction and Judgments Act 1982 s 42(8). A company may have more than one seat for this purpose: *Domansa v Derin Shipping and Trading Co Inc* [2001] 1 Lloyd's Rep 362.

6 Civil Jurisdiction and Judgments Act 1982 s 42(3). 'Central management and control' is exercised where the company keeps house and does its real business: *Domansa v Derin Shipping and Trading Co Inc* [2001] 1 Lloyd's Rep 362 (company whose business was owning and operating a vessel was domiciled in London rather than where the vessel was managed).

7 'Business' includes any activity carried on by a corporation or association, and 'place of business' must be construed accordingly: Civil Jurisdiction and Judgments Act 1982 s 42(8).

8 *Ibid* s 42(4).

9 *Ibid* s 42(5).

10 *Ibid* s 42(6).

11 *Ibid* s 42(7).

12 As to the 'Brussels I' Regulation see para 65 note 1 *ante*. For the meaning of 'the Conventions' see para 65 note 5 *ante*.

13 See the 'Brussels I' Regulation art 22 para 2; the Brussels Convention art 16 para 2; the Lugano Convention art 16 para 2; the Civil Jurisdiction and Judgments Act 1982 s 16 (as amended), Sch 4 rules 4, 11(b) (Sch 4 as substituted); and para 76 text and note 3 *ante*.

14 Civil Jurisdiction and Judgments Act 1982 s 43(1), (2) (s 43(1) amended by the Civil Jurisdiction and Judgments Act 1991 Sch 2 para 18; and the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4 Sch 2 Pt V para 16(a)); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 paras 10(1), (2).

15 Civil Jurisdiction and Judgments Act 1982 s 43(6); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 10(3). However, for the purposes of the 'Brussels I' Regulation, a company, legal person or association must not be regarded as having its seat in a Regulation state other than the United Kingdom if it has its seat in the United Kingdom by virtue of the fact that it was incorporated or formed under the law of a part of the United Kingdom (see the text and note 14 *supra*) or if it is shown that the courts of that other state would not regard it for the purposes of the 'Brussels I' Regulation art 22 para 2 as having its seat there: Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 10(4). Similarly, under the Conventions, a corporation or association must not be regarded as having its seat in a contracting state other than the United Kingdom if it has its seat in the United Kingdom by virtue of the Civil Jurisdiction and Judgments Act 1982 s 43(2)(a) (see the text and note 14 *supra*), or if it is shown that the courts of that state would not regard it for the purposes of art 16 para 2 of the Conventions as having its seat there: Civil Jurisdiction and Judgments Act 1982 s 43(7).

16 For these purposes, a corporation or association formed under an enactment forming part of the law of more than one part of the United Kingdom, or an instrument having effect in the domestic law of more than one part of the United Kingdom must, if it has a registered office, be taken to have its seat in the part of the United Kingdom in which that office is situated, and not in any other part of the United Kingdom: *ibid* s 43(5).

17 *Ibid* s 43(3), which is expressed to be subject to s 43(5) (see note 16 *supra*). For particular provision relating to Scotland see s 43(4).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/ (v) Jurisdiction based on Domicile/B. DOMICILE IN THE UNITED KINGDOM/86. Trusts.

86. Trusts.

For the purposes of the 'Brussels I' Regulation, the Brussels and Lugano Conventions¹ and the Civil Jurisdiction and Judgments Act 1982, a trust is domiciled in the United Kingdom² if, and only if, it is domiciled in a part of the United Kingdom³; it is domiciled in a part of the United Kingdom if, and only if, the system of law of that part is the system of law with which the trust has its closest and most real connection⁴.

1 As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

2 For the meaning of 'United Kingdom' see para 4 ante.

3 Civil Jurisdiction and Judgments Act 1982 s 45(1), (2) (s 45(1) amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 2 para 20); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 paras 12(1), (2). For the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

4 Civil Jurisdiction and Judgments Act 1982 s 45(3); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 paras 12(3).

UPDATE

86 Trusts

NOTE 4--See *Gomez v Gomez-Monche Vives* [2008] EWCA Civ 1065, [2009] 1 All ER (Comm) 127.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/ (v) Jurisdiction based on Domicile/B. DOMICILE IN THE UNITED KINGDOM/87. The Crown.

87. The Crown.

For the purposes of the Civil Jurisdiction and Judgments Act 1982, the seat of the Crown is treated as its domicile¹. For the purposes of the Brussels and Lugano Conventions² and the Civil Jurisdiction and Judgments Act 1982, the Crown in right of Her Majesty's government in the United Kingdom³ has its seat in every part of, and in every place in, the United Kingdom⁴. However, Her Majesty may by Order in Council provide that in the case of proceedings of any specified description against the Crown in right of Her Majesty's government in the United Kingdom, the Crown is to be treated for the purposes of the Conventions and the Civil Jurisdiction and Judgments Act 1982 as having its seat in, and in every place in, a specified part of the United Kingdom and not in any other part of the United Kingdom⁵.

1 Civil Jurisdiction and Judgments Act 1982 s 46(1).

2 As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. Article 53 of the Conventions equates the domicile of a legal person with its seat: see para 83 ante.

3 For the meaning of 'United Kingdom' see para 4 ante. Equivalent provision is made in relation to the Crown in right of the Scottish Administration (see the Civil Jurisdiction and Judgments Act 1982 s 46(3)(aa) (added by the Scotland Act 1998 s 125, Sch 8 para 18(2)); and Her Majesty's government in Northern Ireland (see the Civil Jurisdiction and Judgments Act 1982 s 46(3)(b)). Nothing in these provisions applies to the Crown otherwise than in right of Her Majesty's government in the United Kingdom, the Scottish Administration or Her Majesty's government in Northern Ireland: s 46(7) (amended by the Scotland Act 1998 Sch 8 para 18(3)).

4 Civil Jurisdiction and Judgments Act 1982 s 46(2), (3)(a) (s 46(2) amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 2 para 21). For the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

5 Civil Jurisdiction and Judgments Act 1982 s 46(4) (amended by the Civil Jurisdiction and Judgments Act 1991 Sch 2 para 21). Such an Order in Council may frame a description of proceedings in any way, and in particular may do so by reference to the government department or officer of the Crown against which or whom they fall to be instituted: Civil Jurisdiction and Judgments Act 1982 s 46(5). Any such Order in Council is subject to annulment in pursuance of a resolution of either House of Parliament: s 46(6). At the date at which this volume states the law, no such Order in Council had been made.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/ (v) Jurisdiction based on Domicile/C. DEFENDANT NOT DOMICILED IN A REGULATION STATE OR CONTRACTING STATE/88. Defendant not domiciled in any Regulation state or contracting state.

C. DEFENDANT NOT DOMICILED IN A REGULATION STATE OR CONTRACTING STATE

88. Defendant not domiciled in any Regulation state or contracting state.

If the defendant is not domiciled in a Regulation state or contracting state¹, nor is deemed to have such a domicile under the deeming provisions applicable to insurance and consumer contracts (or, in the case of the 'Brussels I' Regulation only, the deeming provisions applicable to individual contracts of employment)², and if jurisdiction is not otherwise conferred on a court by the 'Brussels I' Regulation or by the Brussels and Lugano Conventions³, the jurisdiction of the courts of each Regulation state or contracting state is to be determined by the law of that state⁴. As against such a defendant, any person domiciled in a Regulation state or contracting state may, whatever his nationality, avail himself in that state of the rules of jurisdiction there in force, in the same way as nationals of that state⁵.

This means that the indigenous rules of the common law, as supplemented by statute, may be resorted to⁶. But it does not follow from this provision that the 'Brussels I' Regulation or the Conventions are in some sense inapplicable; for a court which proposes to assert jurisdiction by reason of this provision may not do so if the same cause of action, between the same parties, was first brought before the courts of another contracting state; and a court which proposes to assert jurisdiction under one of the provisions of the Conventions may not do so if in the courts of another contracting state the same cause of action, between the same parties, was commenced first⁷.

1 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante. Under English law an individual is domiciled in a state other than a Regulation state or a contracting state (as the case may be) only if he is resident in that state, and the nature and circumstances of his residence indicate that he has a substantial connection with that state: Civil Jurisdiction and Judgments Act 1982 s 41(7); Civil Jurisdiction and Judgments Order 2001, SI 2002/3929, Sch 1 para 9(7). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See paras 80 note 9, 81 note 10, 82 note 8 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante.

3 See paras 75-79 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

4 'Brussels I' Regulation art 4 para 1; Brussels Convention art 4, 1st para; Lugano Convention art 4, 1st para. These are expressly subject to the provisions of arts 22-23 of the 'Brussels I' Regulation and art 16 of the Conventions: see paras 75-76 ante. As to references to numbered articles of the Conventions see para 65 note 8 ante.

5 'Brussels I' Regulation art 4 para 2; Brussels Convention art 4, 2nd para; Lugano Convention art 4, 2nd para. In particular, these provisions refer to those excluded as against a defendant domiciled in a contracting state by art 3 and annex I of the 'Brussels I' Regulation and by art 3 of the Conventions: see para 83 note 12 ante.

6 See para 95 et seq post.

7 Case C-351/89 *Overseas Union Insurance Ltd v New Hampshire Insurance Co* [1991] ECR I-3317, ECJ. In other words, the jurisdiction of a court over a non-contracting state domiciliary, invoked by reason of art 4 of

the Conventions (or, by extension, art 4 of the 'Brussels I' Regulation), is itself derived from, and subject to the other restrictions contained in, the 'Brussels I' Regulation and the Conventions.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/ (v) Jurisdiction based on Domicile/D. DEFENDANT DOMICILED IN ANOTHER REGULATION STATE OR CONTRACTING STATE/89. Special jurisdiction.

D. DEFENDANT DOMICILED IN ANOTHER REGULATION STATE OR CONTRACTING STATE

89. Special jurisdiction.

A defendant who is domiciled in a Regulation state or in a contracting state¹ may nevertheless be sued in another Regulation state or contracting state if the matter is subject to the special jurisdiction of the courts of that other Regulation state or contracting state². Because these provisions, which apply exclusively to those domiciled in another state, derogate from a defendant's presumptive right to be sued in his home courts, they are construed restrictively³. Although they are in principle intended to get the litigation into a court with which it is closely connected, it is not open to the defendant to argue in a particular case that, because the special jurisdictional rule would lead to litigation in a court which in fact had little connection with the dispute, the court should on that account alone determine that it has no special jurisdiction⁴. In all cases falling within the special jurisdiction provisions, there will be at least one other state which has jurisdiction, and the provisions which regulate a situation of *lis alibi pendens* may well have to be used to resolve the problem of parallel proceedings⁵.

Similarly, a defendant who is domiciled in a particular part of the United Kingdom⁶ may nevertheless be sued in another part of the United Kingdom if the matter is subject to the special jurisdiction of the courts of that other part of the United Kingdom⁷.

1 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

2 See the 'Brussels I' Regulation art 5; the Brussels Convention art 5; the Lugano Convention art 5; and paras 90-92 post. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

The term 'special jurisdiction' is not defined, being taken from the heading of Section 2 of the 'Brussels I' Regulation (arts 5-7) and Section 2 (arts 5-6A) of the Conventions and of the United Kingdom scheme. As to references to numbered articles of the Conventions see para 65 note 8 ante. For the meaning of 'United Kingdom' see para 4 ante.

3 See in particular Case C-220/88 *Dumez France SA v Hessische Landesbank* [1990] ECR I-49, ECJ. The court is likely to be especially hostile to a construction which will routinely permit a claimant to bring proceedings in his home court: Case C-364/93 *Marinari v Lloyd's Bank plc (Zubaidi Trading Co intervening)* [1996] All ER (EC), 84, [1996] 2 WLR 159, ECJ.

4 Case C-288/92 *Custom Made Commercial Ltd v Stawa Metallbau GmbH* [1994] ECR I-2913, ECJ.

5 See para 128 post.

6 For the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

7 See the Civil Jurisdiction and Judgments Act 1982 s 16(1) (as amended), Sch 4 rule 3 (Sch 4 as substituted); and paras 90-92 post. As to the adaptation of the provisions of the Conventions by the Civil Jurisdiction and Judgments Act 1982 Sch 4 (as substituted) to a scheme applying as between parts of the United Kingdom see para 66 ante. As to the interpretation of the scheme by reference to decisions under the Brussels Convention or the 'Brussels I' Regulation see para 70 ante.

The term 'special jurisdiction' is not defined, being taken from the heading of the Civil Jurisdiction and Judgments Act 1982 Sch 4 rules 3-6 (Sch 4 as substituted) of the scheme.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/ (v) Jurisdiction based on Domicile/D. DEFENDANT DOMICILED IN ANOTHER REGULATION STATE OR CONTRACTING STATE/90. Matters relating to contract.

90. Matters relating to contract.

A defendant domiciled in a Regulation state or in a contracting state¹ may be sued in another Regulation state or contracting state, in matters relating to a contract, in the courts for the place of performance of the obligation in question². Similarly, a person domiciled in a part of the United Kingdom³ may be sued in another part of the United Kingdom, in matters relating to a contract, in the courts for the place of performance of the obligation in question⁴.

A court may exercise this jurisdiction even if the defendant contends that there was no contract between the parties⁵. The court may accept jurisdiction if there is a good arguable case that there was such a contract as would confer jurisdiction upon it⁶.

'Matter relating to a contract' bears an autonomous meaning, not to be interpreted by reference to national law⁷. Its defining characteristic is that there is an obligation, freely entered into with regard to another⁸. The 'obligation in question' means the obligation in respect of which the claimant brings his claim, or upon the non-performance of which he founds his action⁹. Where there is more than one such obligation, the court may conclude that one of them is the principal to which the others are merely accessory; the principal one will determine the jurisdiction¹⁰. Where there is a single obligation calling for performance in more contracting states than one it will be the contracting state in which it was principally to be performed which will have jurisdiction¹¹. Under the United Kingdom scheme, it seems that a matter may be a 'matter relating to a contract' even if the contract is void¹².

The general rule is that the place where the obligation was to be performed is determined by the court seised applying its rules of national law, including its conflicts rules¹³. However, special rules are provided for this purpose where the 'Brussels I' Regulation applies to specified types of contract¹⁴. Accordingly: (1) in the case of the sale of goods, the place of performance of the obligation in question is the place in a Regulation state where, under the contract, the goods were delivered or should have been delivered; and (2) in the case of the provision of services, it is the place in a Regulation state where, under the contract, the services were provided or should have been provided¹⁵. If these rules do not apply, then the general rule applies¹⁶.

In relation to an individual contract of employment, the Brussels Convention provides that the place in question is that where the employee habitually carries out his work, or, if the employee does not habitually carry out his work in any one country, the employer may be sued in the courts for the place where the business which engaged the employee was or is now situated¹⁷. Under the Lugano Convention in matters relating to individual contracts of employment, the place of performance of the obligation is the place where the employee habitually carries on his work, or, if he does not carry out his work in any one country, the place of business through which he was engaged¹⁸.

1 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

2 'Brussels I' Regulation art 5 para 1(a); Brussels Convention art 5 para 1; Lugano Convention art 5 para 1. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. In the case of a person who is domiciled in the territory of the Grand Duchy of Luxembourg and is sued in a court of another Regulation state pursuant to art 5 para 1, he

may refuse to submit to the jurisdiction of that court if the final place of delivery of the goods or provision of the services (excluding the provision of financial services) is in Luxembourg: art 63.

3 For the meaning of 'United Kingdom' see para 4 ante; and for the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

4 Civil Jurisdiction and Judgments Act 1982 s 16(1), Sch 4 rule 3(a) (s 16(1) amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt II para 3(a); and the Civil Jurisdiction and Judgments Act 1982 Sch 4 substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt II para 4). See *Viskase Ltd v Paul Kiefel GmbH* [1999] 3 All ER 362, [1999] 1 WLR 1305, CA (contractual obligation to supply a machine fit for the known purpose was performed once and for all at the time and place of delivery, even if any defect was discovered only afterwards); *Kleinwort Benson v Glasgow City Council* [1999] 1 AC 153, [1997] 4 All ER 641, HL (a claim for the recovery of money paid under a supposed contract which in law had never existed was not a matter relating to a contract, but was a claim for restitution based on the principle of unjust enrichment). As to the adaptation of the provisions of the Conventions by the Civil Jurisdiction and Judgments Act 1982 Sch 4 (as substituted) to a scheme applying as between parts of the United Kingdom see para 66 ante. As to the interpretation of the scheme by reference to decisions under the Brussels Convention or the 'Brussels I' Regulation see para 70 ante.

5 Case 38/81 *Effer SpA v Kantner* [1982] ECR 825, [1984] 2 CMLR 667, ECJ.

6 *Tesam Distribution Ltd v Schuh Mode Team GmbH* [1990] IL Pr 149, CA; *Mölnlycke AB v Procter & Gamble Ltd* [1992] 4 All ER 47, [1992] 1 WLR 1112, CA.

7 Case 34/82 *Peters v ZNAV* [1983] ECR 987, ECJ; Case C-26/91 *Jakob Handte GmbH v Traitements Mécano-chimiques des Surfaces* [1992] ECR I-3967, ECJ; Case C-214/89 *Powell Duffryn plc v Petereit* [1992] ECR I-1745, ECJ; Case C-51/97 *Réunion Européenne SA v Spliethoff's Bevrachtungskantoor BV* [2000] QB 690, ECJ ('matters relating to a contract' does not cover a situation where there is no obligation freely assumed by one party towards the other). This definition would probably encompass all actions seen as contractual in English law. See *Source Ltd v Rheinland Holding AG* [1998] QB 54, CA (a claim which in English law can be brought either under a contract or, on the same facts, without establishing that a contract exists, is a 'matter relating to a contract') but this decision has been questioned (see *Raiffeisen Zentralbank Oesterreich AG v National Bank of Greece SA* [1999] 1 Lloyd's Rep 408). See also *Agnew v Lansförsäkringsbølagens AB* [2001] 1 AC 223, [2000] 1 All ER 737, HL (claim to set aside a contract for failure of the pre-contractual obligation to disclose was a 'matter relating to contract' and the place of performance was the place where disclosure should have been given or was defectively given). See also the text and notes 8, 12 infra. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

8 Case C-26/91 *Jakob Handte GmbH v Traitements Mécano-chimiques des Surfaces* [1992] ECR I-3967, ECJ. See also *Atlas Shipping Agency (UK) Ltd v Suisse Atlantique Société d'Armement Maritime SA* [1995] IL Pr 600 (commission payment to shipbroker provided for in contract between buyer and seller was a 'matter relating to a contract' when claimed by the shipbroker). But cf *Trade Indemnity plc v Forsäkringsaktiebølaget Njord (in liquidation)* [1995] 1 All ER 796. It therefore excludes an action by a sub-buyer against the manufacturer, who does not freely enter into an engagement with the sub-buyer: see Case C-26/91 *Jakob Handte GmbH v Traitements Mécano-chimiques des Surfaces* supra, where according to the national law of the court seized the claim would have been contractual.

A restitutionary claim arising out of a void contract cannot be brought within it: see *Kleinwort Benson Ltd v Glasgow City Council* [1999] 1 AC 153, [1997] 4 All ER 641, HL. However, the European Court (see Case C-346/93 *Kleinwort Benson Ltd v Glasgow City Council* [1995] ECR I-615, [1995] All ER (EC) 514, ECJ) declined jurisdiction when this question was referred to them (because the question arose in the context of the internal jurisdictional provisions of the United Kingdom rather than the Brussels Convention: see para 70 text and note 8 ante) and it remains open for the European Court to reach a different conclusion when such a question falls to be decided under the 'Brussels I' Regulation or the Brussels or Lugano Convention.

9 Case 14/76 *De Bloos Sprl v Société en commandite par actions Bouyer* [1976] ECR 1497, [1977] 1 CMLR 60, ECJ; Case 266/85 *Shenavai v Kreischer* [1987] ECR 239, ECJ; *Union Transport plc v Continental Lines SA* [1992] 1 All ER 161, [1992] 1 WLR 15, HL; *Medway Packaging Ltd v Meurer Maschinen GmbH & Co KG* [1990] 2 Lloyd's Rep 112, CA. The 'obligation in question' can include: the pre-contractual duty of good faith (*Agnew v Lansförsäkringsbølagens AB* [2001] 1 AC 223, [2000] 1 All ER 737, HL); an implied term (*Raiffeisen Zentralbank Oesterreich Aktiengesellschaft v National Bank of Greece SA* [1999] 1 Lloyd's Rep 408); or a disputed duty under a contract which the claimant alleges does not exist (*USF Ltd (t/a USF Memcor) v Aqua Technology Hanson NV/SA* [2001] 1 All ER (Comm) 856). The obligation to pay damages for breach will not usually be seen as the obligation in question, unless it can be seen as a primary, rather than a compensatory or remedial, obligation: Case 14/76 *De Bloos Sprl v Société en commandite par actions Bouyer* supra.

10 Case 266/85 *Shenavai v Kreischer* [1987] ECR 239, ECJ; *Union Transport plc v Continental Lines SA* [1992] 1 All ER 161, [1992] 1 WLR 15, HL. A court seized of an action concerning the breach of two contractual obligations of equal rank, one to be performed in the state of that court and the other in another contracting

state, does not have jurisdiction under the Brussels Convention art 5 para 1 in relation to the obligation to be performed elsewhere: Case C-420/97 *Leathertex Divisione Sintetici SpA v Bodetex BVBA* [1999] 2 All ER (Comm) 769, ECJ.

11 Case C-125/92 *Mulox IBC Ltd v Geels* [1993] ECR I-4075, ECJ.

12 See the cases cited in note 7 supra; and cf *Boss Group v Boss France SA* [1996] 4 All ER 970, [1997] 1 WLR 351, CA.

13 Case 12/76 *Industrie Tessili v Dunlop AG* [1976] ECR 1473, [1977] 1 CMLR 26, ECJ; Case C-288/92 *Custom Made Commercial Ltd v Stawa Metallbau GmbH* [1994] ECR I-2913, ECJ; Case C-440/97 *GIE Groupe Concorde v Master of the Vessel Suhadiwarno Panjan* [2000] All ER (EC) 865, ECJ. See also *RPS Prodotti Siderurgici SRL v Owners and/or demise charterers of The Sea Maas, The Sea Maas* [1999] 2 Lloyd's Rep 281, [1999] 1 All ER (Comm) 945 (in a claim under a bill of lading where it is alleged that the defendant failed to use due diligence to provide a seaworthy vessel at the commencement of the voyage, the place of performance is the port of loading); *Credit Agricole Indosuez v Chailease Finance Corpn* [2000] 1 All ER (Comm) 399, CA (the place of performance of an obligation under a letter of credit was the place nominated under the letter even if it was issued elsewhere).

In England, the court must ascertain the law which governs the contract, and construe the contract according to that law to determine where the obligation in question was to be performed: see para 349 et seq post. In general, English law supposes that money payable under a contract is due to be paid at the place where the creditor resides, and that, as a result, an unpaid English seller under a contract governed by English law may sue the recalcitrant purchaser in England: *The Eider* [1893] P 119, CA; *Bank of Scotland v Seitz* 1990 SLT 584, Ct of Sess; *Montagu Evans v Young* 2000 SLT 1083, (2000) Times, 19 September, OH.

14 See the 'Brussels I' Regulation art 5 para 1(b).

15 Ibid art 5 para 1(b).

16 Ibid art 5 para 1(c).

17 Brussels Convention art 5 para 1. As to the analogous provisions in the Lugano Convention see the text and note 18 infra. As to analogous provisions in the 'Brussels I' Regulation (and hence also the scheme applicable within the United Kingdom) see para 82 ante.

Where, in the performance of a contract of employment, an employee carries out work in several contracting states, the place where he habitually carries out his work is the place where he has established the effective centre of his working activities and where or from which he performs the essential part of his duties: Case C-383/95 *Rutten v Cross Medical Ltd* [1997] ICR 715, ECJ, citing Case C-125/92 *Mulox IBC Ltd v Geels* [1993] ECR I-4075, ECJ (decided under the Brussels Convention prior to its amendment by the 1989 Accession Convention (see para 65 note 2 ante)). An employee carrying out work on a fixed or floating installation positioned on or above part of the continental shelf adjacent to a contracting state is to be regarded as performing his contract of employment in that place and may sue his employer in the territory of that state: Case C-37/00 *Weber v Universal Ogden Services Ltd* [2002] QB 1189, [2002] ICR 979, ECJ.

18 Lugano Convention art 5 para 1.

UPDATE

90 Matters relating to contract

NOTE 2--See also *Crucial Music Corpn v Klondyke Management AG* [2007] EWHC 1782 (Ch), [2008] 1 All ER (Comm) 548.

NOTE 15--The first indent of EC Council Regulation 44/2001 (Brussels I) art 5(1)(b) must be interpreted as applying where there are several places of delivery within a single Member State; the court having jurisdiction to hear all the actions based on the contract for the sale of goods is that in the area of the principal place of delivery, which must be determined on the basis of economic criteria and in the absence of determining factors for establishing the principal place of delivery, the plaintiff may sue the defendant in the court for the place of delivery of its choice: C-386/05 *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR I-3699, [2008] 1 All ER (Comm) 168, ECJ.

The second indent of EC Council Regulation 44/2001 (Brussels I) art 5(1)(b) is interpreted as meaning where services are provided in several member states, the court which has jurisdiction to hear and determine all the claims arising from the contract is the court in whose jurisdiction the place of the main provision of services is situated; for a commercial agency contract, that place is the place of the main provision of services by the agent, as it appears from the provisions of the contract or, in the absence of such provisions, the actual performance of that contract or, where it cannot be established on that basis, the place where the agent is domiciled: Case C-19/09 *Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA* [2010] All ER (D) 130 (Mar), ECJ. See also Case C-204/08 *Rehder v Air Baltic Corp* [2010] Bus LR 549, [2009] All ER (D) 153 (Jul) (passenger claiming compensation from airline might sue airline in courts of place of arrival or departure); and Case C-533/07 *Falco Privatstiftung v Weller-Lindhorst* [2010] Bus LR 210, [2009] All ER (D) 14 (May), ECJ.

In the case of an international contract of sale on cif or similar terms (as to which, see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 324 et seq), as opposed to an ex ship contract, the place of delivery is the place from which the goods are shipped rather than the place of physical delivery to the buyer: *Scottish and Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 11, [2008] 2 All ER 768.

NOTE 17--Where an employee's contractual obligations to a first employer are suspended and she is seconded to a second employer in another contracting state, the place where the employee performs her obligations to the second employer is the place where the employee habitually carries out her work under the contract with the first employer: Case C-437/00 *Pugliese v Finmeccanica SpA* [2004] All ER (EC) 154, ECJ.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/ (v) Jurisdiction based on Domicile/D. DEFENDANT DOMICILED IN ANOTHER REGULATION STATE OR CONTRACTING STATE/91. Matters relating to tort.

91. Matters relating to tort.

A defendant domiciled in a Regulation state or in a contracting state¹ may be sued in another contracting state, in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred². A person domiciled in a part of the United Kingdom³ may be sued in another part of the United Kingdom, in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur⁴.

The definition of a matter 'relating to tort' is an autonomous one, and has been held to cover any action which seeks to establish the liability of a defendant, but which is not a matter relating to a contract⁵.

The courts given jurisdiction are those for the place where the damage occurred, and those for the place of the event giving rise to the damage⁶. The damage may be economic or non-economic, but the place where it is suffered is not a competent jurisdiction if the place where it occurred is elsewhere⁷. If damage occurs in a number of contracting states, each state may exercise special jurisdiction over so much of the damage as occurred within its territorial jurisdiction⁸.

1 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

2 'Brussels I' Regulation art 5 para 3; Brussels Convention art 5 para 3; Lugano Convention art 5 para 3. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

In relation to 'the place where the harmful event occurred' see Case C-51/97 *Réunion Européenne SA v Spliethoff's Bevrachtungskantoor BV* [2000] QB 690, ECJ (in the case of goods damaged during international transport, this was not the place where the damage was discovered, but the place where the damage occurred, ie the place of delivery of the goods by the carrier).

Note that the phrase 'or may occur' is appended to the 'Brussels I' Regulation art 5 para 3 (and hence the Civil Jurisdiction and Judgments Act 1982 Sch 4: see note 4 infra) but that the jurisdiction conferred on the basis of a threatened harmful event has no equivalent in the Conventions.

3 For the meaning of 'United Kingdom' see para 4 ante; and for the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

4 Civil Jurisdiction and Judgments Act 1982 s 16(1), Sch 4 rule 3(c) (s 16(1) amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt II para 3(a); and the Civil Jurisdiction and Judgments Act 1982 Sch 4 substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt II para 4). As to the adaptation of the provisions of the Conventions by the Civil Jurisdiction and Judgments Act 1982 Sch 4 (as substituted) to a scheme applying as between parts of the United Kingdom see para 66 ante. As to the interpretation of the scheme by reference to decisions under the Brussels Convention or the 'Brussels I' Regulation see para 70 ante. Note, however, that this rule confers jurisdiction on the courts of a part of the United Kingdom on the basis of a threatened harmful event, being the form of the article which is to be found in the 'Brussels I' Regulation (see note 2 supra) but which has no equivalent in the Conventions.

In relation to the Civil Jurisdiction and Judgments Act 1982 Sch 4 as it was adapted from the Conventions (rather than from the Regulation) see *Modus Vivendi Ltd v British Products Sanmex Co Ltd* [1996] FSR 790 (Scottish jurisdiction applied where an English company sued a Scottish company whose actions were the matter principally relied on); *Dexter Ltd (in administrative receivership) v Harley* (2001) Times, 2 April (in a constructive trust claim based on knowing receipt or dishonest assistance, the concept of a 'harmful event' must relate directly to an act or omission for which the defendant was responsible and it is irrelevant that an original breach of trust or fiduciary duty by someone other than the defendant took place within the

jurisdiction); *Bonnier Media Ltd v Smith* (2002) Times, 10 July, OH (where a person uses an internet website domain name that infringes a trade mark, he may be sued in any country or place where the website can be seen and where it is likely to be of significant interest). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

5 Case 189/87 *Kalfelis v Schröder* [1988] ECR 5565, ECJ; Case C-364/93 *Marinari v Lloyd's Bank plc* (*Zubaidi Trading Co intervening*) [1996] QB 217, [1996] All ER (EC) 84, ECJ; *Kitechnology BV v Unicolor GmbH Plastmaschinen* [1994] IL Pr 568, CA (breach of confidence). As to matters relating to a contract see para 90 ante. Cf *Barclays Bank plc v Glasgow City Council, Kleinwort Benson Ltd v Glasgow City Council* [1994] QB 404, [1994] 4 All ER 865, CA, where the question whether special jurisdiction was conferred as a matter relating to a contract or tort was referred to the European Court (see Case C-346/93 *Kleinwort Benson Ltd v Glasgow City Council* [1995] ECR I-615, [1995] All ER (EC) 514, ECJ), which declined jurisdiction because the question arose in the context of the internal jurisdictional provisions of the United Kingdom rather than the Brussels Convention (see para 70 text and note 8 ante). In the House of Lords (see *Kleinwort Benson Ltd v Glasgow City Council* [1999] 1 AC 153, [1997] 4 All ER 641, HL), it was held that a restitutionary claim arising out of a void contract could not fall within the Brussels Convention art 5 para 3 because there had been no 'harmful event'.

It appears that the definition has been subject to qualification, for the special jurisdiction has also been held to be inapplicable to an action for a declaration that a transfer of property to a transferee was ineffective as against a creditor of the transferor, on the ground that the action did not seek to establish the 'liability' of the defendant: Case C-261/90 *Reichert v Dresdner Bank AG (No 2)* [1992] ECR I-2149, ECJ. It is unclear whether 'liability' in that context means 'liability for wrongdoing' or 'liability to perform an obligation owed to the claimant'.

6 Case 21/76 *Handelswekerij GJ Bier BV und Stichting Reinwater v Mines de Potasse d'Alsace SA* [1978] QB 708, [1976] ECR 1735, ECJ (effluent pumped into the river Rhine in France caused damage to the market-garden of the claimant in Holland; the Dutch and the French courts had special jurisdiction, and the claimant was entitled to elect between them). See also Case C-68/93 *Shevill v Presse Alliance SA* [1995] 2 AC 18, [1995] ECR I-415, ECJ (an action for defamation may be brought where a newspaper is distributed only in respect of distribution within that contracting state). See also *Henderson v Jaouen* [2002] EWCA Civ 75, [2002] 2 All ER 705, [2002] 1 WLR 2971 (a personal injury action for further damages, based on the deterioration of the claimant's condition, must be brought in the same jurisdiction as the original action).

7 Case C-220/88 *Dumez France v Hessische Landesbank* [1990] ECR I-49, ECJ; Case C-364/93 *Marinari v Lloyd's Bank plc* (*Zubaidi Trading Co intervening*) [1996] QB 217, [1996] All ER (EC) 84, ECJ.

See also *Mecklermedia v DC Congress* [1998] Ch 40, [1998] 1 All ER 148 (in the tort of passing off, the harmful event occurs where the harm is done to the claimant's goodwill and reputation); *Domicrest Ltd v Swiss Bank Corp* [1999] QB 548, [1998] 3 All ER 577 (in the case of negligent misrepresentation, the place where the harm occurred is the place where the representation was made, and not where it was received); *Alfred Dunhill Ltd v Diffusion Internationale de Maroquinerie de Prestige SARL* [2002] 1 All ER (Comm) 950 (the place where the harmful event occurs in the case of negligent misstatement is, by analogy with defamation, the place where the misstatement originated).

8 *Shevill v Presse Alliance SA* [1996] AC 959, [1992] 1 All ER 409, CA; affd [1996] AC 959, [1996] 3 All ER 929, HL. See also the proceedings in the European Court: Case C-68/93 *Shevill v Presse Alliance SA* [1995] 2 AC 18, [1995] ECR I-415, ECJ. It was held that, because, under English law, each publication of a libel is a separate tort, separate actions in each relevant jurisdiction are permitted as a matter of principle, notwithstanding that the libellous material was published abroad.

UPDATE

91 Matters relating to tort

NOTE 2--The expression 'place where the harmful event occurred' covers both the place where the damage occurred and the place of the event that gave rise to it, so that the defendant could be sued, at the option of the claimant, in the courts of either of those places: Case C-168/02 *Kronhofer v Maier* [2004] All ER (EC) 939, ECJ. See Case C-18/02 *Danmarks Rederiforening v LO Landsorganisationen i Sverige* [2004] 2 Lloyd's Rep 162, ECJ (ship prevented from sailing due to industrial action; damage occurred in flag state). See also *Crucial Music Corp v Klondyke Management AG* [2007] EWHC 1782 (Ch), [2008] 1 All ER (Comm) 548; and *Hewden Tower Cranes Ltd v Wolffkran GmbH* [2007] EWHC 857 (TCC), [2007] BLR 273.

NOTE 6--See *Equitas Ltd v Wave City Shipping Co Ltd* [2005] EWHC 923 (Comm), [2005] 2 All ER (Comm) 301. Case C-21/76, cited, applied in *London Helicopters Ltd v Heliportugal LDA-INAC* [2006] EWHC 108 (QB), [2006] 1 All ER (Comm) 595.

NOTE 7--*Domicrest Ltd*, cited, applied in *SanDisk Corp v Koninklijke Philips Electronics* [2007] EWHC 332 (Ch), [2007] Bus LR 705.

NOTE 8--As to the appropriate forum for an action for internet libel, see *King v Lewis* [2004] EWCA Civ 1329, (2004) Times, 26 October; and LIBEL AND SLANDER vol 28 (Reissue) PARA 66.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/ (v) Jurisdiction based on Domicile/D. DEFENDANT DOMICILED IN ANOTHER REGULATION STATE OR CONTRACTING STATE/92. Other matters giving rise to special jurisdiction.

92. Other matters giving rise to special jurisdiction.

A defendant domiciled in a Regulation state or in a contracting state¹, or a particular part of the United Kingdom², may be sued in another contracting state (or as the case may be, another part of the United Kingdom), in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident³.

As regards a claim for damages or restitution based on an act giving rise to criminal proceedings, jurisdiction is given to the court seised of the criminal proceedings to the extent that the court has jurisdiction under its own law to entertain civil proceedings⁴.

As regards a dispute arising out of the operation of a branch, agency or other establishment, jurisdiction is given to the courts for the place in which the establishment is situated⁵.

A defendant sued as trustee, settlor or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, may be sued in the courts for the contracting state (or, as the case may be, for the part of the United Kingdom) in which the trust is domiciled⁶.

As regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, a defendant may be sued in the court under the authority of which the cargo or freight has been arrested to secure payment, or could have been arrested although bail or other security has been given, provided that this applies only if the defendant is claimed to have an interest in the cargo or freight or to have had such an interest at the time of salvage⁷.

In relation to the determination of jurisdiction as between parts of the United Kingdom, in proceedings concerning a debt secured on immovable property, or brought to assert or declare proprietary or possessory rights, or rights of security, in or over movable property, or to obtain authority to dispose of movable property, jurisdiction is given to the courts of the part of the United Kingdom in which the property is situated⁸. Proceedings which have as their object a decision of an organ of a company or other legal person may be brought in the courts of the part of the United Kingdom in which that company, legal person or association has its seat⁹.

1 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

2 For the meaning of 'United Kingdom' see para 4 ante; and for the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

3 'Brussels I' Regulation art 5 para 2; Brussels Convention art 5 para 2; Lugano Convention art 5 para 2. See also the Civil Jurisdiction and Judgments Act 1982 s 16(1), Sch 4 rule 3(b) (s 16(1) amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt II para 3(a); and the Civil Jurisdiction and Judgments Act 1982 Sch 4 substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt II para 4). If the matter is ancillary to proceedings concerning the status of a person, the defendant may be sued in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties: 'Brussels I' Regulation art 5 para 2; Brussels Convention art 5 para 2; Lugano Convention art 5 para 2. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 3(b) (Sch 4 as so substituted). As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. As to the adaptation of the provisions of the 'Brussels I' Regulation by the Civil Jurisdiction and Judgments Act 1982 Sch 4

(as substituted) to a scheme applying as between parts of the United Kingdom see para 66 ante. As to the interpretation of the scheme by reference to decisions under the Brussels Convention or the 'Brussels I' Regulation see para 70 ante.

It becomes necessary to distinguish 'matters relating to maintenance' from 'rights in property arising out of a matrimonial relationship' since the latter are excluded from the scope of the 'Brussels I' Regulation and the Conventions: see para 74 note 6 ante. Regard should be had in each particular case to the specific aim of the decision sought. 'Maintenance' includes obligations imposed on spouses either by legislation or by the courts for the period after divorce (Case 120/79 *De Cavel v De Cavel (No 2)* [1980] ECR 731); it can include an order for the payment of a lump sum and the transfer of ownership of certain property by one party to the former spouse if its purpose is to ensure the former spouse's maintenance (rather than simply to divide property between spouses) and if the needs of each of the spouses are taken into account (Case C-220/95 *Van den Boogaard v Laumen* [1997] QB 759, [1997] 2 FLR 399, ECJ). The term 'maintenance creditor' has an autonomous meaning, which is not restricted to persons whose entitlement to maintenance has already been established by a court and includes a person bringing a maintenance action for the first time: Case C-295/95 *Farrell v Long* [1997] QB 842, ECJ. As to the enforcement of maintenance orders under the 'Brussels I' Regulation and the Conventions see para 335 post.

Maintenance obligations and other ancillary measures are also excluded deliberately from the scope of the 'Brussels II' Regulation (see para 242 et seq post) but these areas are subject to further regulation within the European Union: see para 65 note 1 ante. As to the 'Brussels II' Regulation see para 242 note 4 post.

4 'Brussels I' Regulation art 5 para 4; Brussels Convention art 5 para 4; Lugano Convention art 5 para 4. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 3(d) (Sch 4 as substituted: see note 3 supra); and see Case C-172/91 *Sonntag v Waidmann* [1993] ECR I-1963, ECJ.

5 'Brussels I' Regulation art 5 para 5; Brussels Convention art 5 para 5; Lugano Convention art 5 para 5. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 3(e) (Sch 4 as substituted: see note 3 supra). As to what is a branch, agency or establishment see Case 14/76 *De Bloos Sprl v Société en commandite par actions Bouyer* [1976] ECR 1497, [1977] 1 CMLR 60, ECJ (exclusive distributor); Case 33/78 *Etablissements Somafer SA v Saar-Ferngas AG* [1978] ECR 2183, [1979] 1 CMLR 490, ECJ (appearance of permanency); Case 139/80 *Blankaert and Willems PVBA v Trost* [1981] ECR 819, [1982] 2 CMLR 1, ECJ (independent commercial agent); Case 218/86 *SAR Schotte GmbH v Parfums Rothschild Sarl* [1987] ECR 4905, ECJ (appearance created by letterhead). It is not necessary for the purpose of art 5 para 5 of the Conventions that the undertakings entered into by the branch are to be performed in the contracting state in which that branch is situated: Case C-439/93 *Lloyd's Register of Shipping v Société Campenon Bernard* [1995] ECR I-961, [1995] All ER (EC) 531, ECJ. See also the opinion of the Advocate General in Case C-89/91 *Shearson Lehmann Hutton Inc v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* [1993] ECR I-139, ECJ, suggesting that in order to be seen as an establishment to which this provision may apply, there must be sufficient control for the body be an agent, but enough independence for it to be able to make contracts which bind the parent body.

6 'Brussels I' Regulation art 5 para 6; Brussels Convention art 5 para 6; Lugano Convention art 5 para 6. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 3(f) (Sch 4 as substituted: see note 3 supra). Any proceedings brought by virtue of these provisions in the United Kingdom must be brought in the courts of the part of the United Kingdom in which the trust is domiciled: s 10(2). As to the determination of domicile of a trust see paras 83 text and note 11, 86 ante.

7 'Brussels I' Regulation art 5 para 7; Brussels Convention art 5 para 7; Lugano Convention art 5 para 7. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 3(g) (Sch 4 as substituted: see note 3 supra). Where a court of a contracting state (or, as the case may be, of a part of the United Kingdom), has jurisdiction in actions relating to liability arising from the use of a ship, that court, or any other court substituted for the purpose by the internal law of the state (or part) also has jurisdiction over claims for the limitation of such liability: 'Brussels I' Regulation art 7; Brussels Convention art 6A; Lugano Convention art 6A. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 6 (Sch 4 as substituted: see note 3 supra).

8 Ibid Sch 4 rule 3(h) (Sch 4 as substituted: see note 3 supra).

9 Ibid Sch 4 rule 4 (Sch 4 as substituted: see note 3 supra). As to where a corporation or other legal person has its seat under English law see para 85 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

UPDATE

92 Other matters giving rise to special jurisdiction

NOTE 3--See Case C-433/01 *Freistaat Bayern v Blijdenstein* [2004] All ER (EC) 591, ECJ (public body could not rely on Brussels Convention art 5 para 2 to recover from maintenance debtor sums paid to maintenance creditor by way of education grant).

NOTE 5--A dispute arises out of a branch where there is such nexus between the operations of the branch and the dispute as to render it natural to describe the dispute as one that has arisen out of the operations of that branch: *Anton Durbeck GmbH v Den Norske Bank ASA* [2003] EWCA Civ 147, [2003] 4 All ER 543. The choice of forum afforded to a claimant under the Lugano Convention art 5 cannot be fettered by the court: *Mahme Trust v Lloyds TSB Bank plc* [2004] EWHC 1931 (Ch), [2004] 2 Lloyd's Rep 637.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/ (v) Jurisdiction based on Domicile/D. DEFENDANT DOMICILED IN ANOTHER REGULATION STATE OR CONTRACTING STATE/93. Additional parties and related claims.

93. Additional parties and related claims.

A defendant domiciled in a Regulation state or in a contracting state¹, or in a particular part of the United Kingdom², may also be sued in other specified courts, as follows³:

- 33 (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled⁴ (and, in the case of the United Kingdom or of a Regulation state, provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings⁵); or
- 34 (2) as a third party in an action on a warranty or guarantee, or in any other third party proceedings, in the court seised of the original proceedings unless these were instituted solely with the object of removing him from the jurisdiction of the court which would otherwise have been competent⁶; or
- 35 (3) on a counterclaim arising from the same contract or facts on which the original claim is based, in the court in which the original claim is pending⁷; or
- 36 (4) in matters relating to a contract, if this may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the courts for the contracting state (or, as the case may be, the part of the United Kingdom), in which the property is situated⁸.

It appears that the court probably has a discretion permitting it to decline jurisdiction on procedural grounds which relate to the efficient disposal of the proceedings; the applicant is not entitled to invoke this jurisdiction without regard to the usual procedural conditions of national law. But these procedural rules must not be applied so as to produce a direct conflict with the Brussels or Lugano Convention⁹.

1 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

2 For the meaning of 'United Kingdom' see para 4 ante; and for the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

3 'Brussels I' Regulation art 6; Brussels Convention art 6; Lugano Convention art 6. See also the Civil Jurisdiction and Judgments Act 1982 s 16(1), Sch 4 rule 5(a) (s 16(1) amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt II para 3(a); and the Civil Jurisdiction and Judgments Act 1982 Sch 4 substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt II para 4). These provisions seek to ensure that separate claims which ought to be heard together are efficiently dealt with. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. As to the adaptation of the provisions of the 'Brussels I' Regulation by the Civil Jurisdiction and Judgments Act 1982 Sch 4 (as substituted) to a scheme applying as between parts of the United Kingdom see para 66 ante. As to the interpretation of the scheme by reference to decisions under the Brussels Convention or the 'Brussels I' Regulation see para 70 ante.

4 'Brussels I' Regulation art 6 para 1; Brussels Convention art 6 para 1; Lugano Convention art 6 para 1. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 5(a) (Sch 4 as substituted: see note 3 supra). It is not necessary that the 'one' defendant be the principal defendant, but it is required that the claim against the second defendant be one which needs to be heard with the claim against the first defendant in order to prevent irreconcilable judgments: Case 189/87 *Kalfelis v Schröder* [1988] ECR 5565, ECJ; *Mölnlycke AB v Procter &*

Gamble Ltd [1992] 4 All ER 47, [1992] 1 WLR 1112, CA; *The Eras Eil Actions* [1995] 1 Lloyd's Rep 64 at 74-79; *Qingdao Ocean Shipping Co v Grace Shipping Establishment, Transatlantic Schifffahrtskontor GmbH, Ode and Health Chartering (UK) Ltd, The Xing Su Hai* [1995] 2 Lloyd's Rep 15.

In English proceedings, the relevant time at which the question of a person's domicile must be determined is when the claim form was issued, rather than when it was served: *Petrotrade Inc v Smith* [1998] 2 All ER 346, [1999] 1 WLR 457; *Canada Trust Co v Stolzenberg (No 2)* [2002] 1 AC 1, [2000] 4 All ER 481, HL. Furthermore, process does not have to be served on the defendant whose domicile is relied upon to found jurisdiction prior to the issue or service of proceedings on other defendants who are not so domiciled: *Canada Trust Co v Stolzenberg (No 2)* supra. As to service generally see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

A defendant must show that it is expedient in the interests of justice and administration for the third party proceedings to be heard by the same court as that hearing the main action: *Waterford Wedgwood plc v David Nagli Ltd (Haughton, third party)* [1999] 3 All ER 185, [1998] FSR 92. See also *Casio Computer Co Ltd v Sayo* [2001] EWCA Civ 661, [2001] All ER (D) 147 (Apr); *Dexter Ltd v Harley* (2001) Times, 2 April.

5 'Brussels I' Regulation art 6 para 1. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 5(a) (Sch 4 as substituted: see note 3 supra). This provision applies only where actions which are brought against various defendants are related at the time when proceedings are instituted: *Messier-Dowty Ltd v Sabena SA (No 2)* [2001] 1 All ER 275, [2000] 1 WLR 2040, CA. For a discussion of the question whether two claims, one in tort and one in contract, in which the legal and factual issues are substantially the same, can be considered as connected see *Watson v First Choice Holidays and Flights Ltd* [2001] EWCA Civ 972, [2001] 2 Lloyd's Rep 339.

6 'Brussels I' Regulation art 6 para 2; Brussels Convention art 6 para 2; Lugano Convention art 6 para 2. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 5(b) (Sch 4 as substituted: see note 3 supra). See Case 365/88 *Kongress Agentur Hagen GmbH v Zeehaghe BV* [1990] ECR I-1845, ECJ; *Kinnear v Falconfilms NV* [1994] 3 All ER 42. As to the interaction between this provision and arts 2 and 17 of the Conventions (cf arts 2 and 23 of the 'Brussels I' Regulation) see para 79 ante.

The jurisdiction specified in actions on a warranty of guarantee or in any other third party proceedings may not be resorted to in Germany and Austria, although relevant judgments may be recognised and enforced: see the 'Brussels I' Regulation art 65; the Brussels Convention, Annexed Protocol art V; and the Lugano Convention, Protocol No 1 art V.

7 'Brussels I' Regulation art 6 para 3; Brussels Convention art 6 para 3; Lugano Convention art 6 para 3. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 5(c) (Sch 4 as substituted: see note 3 supra); and see Case 220/84 *A-S Autoteile Service GmbH v Malhé* [1985] ECR 2267, [1986] 3 CMLR 321, ECJ. A defence of set-off is not a counterclaim, and need not comply with this provision: Case C-341/93 *Danvaern Production A/S v Schuhfabriken Otterbeck GmbH & Co* [1995] IL Pr 649, ECJ.

8 'Brussels I' Regulation art 6 para 4; Brussels Convention art 6 para 4; Lugano Convention art 6 para 4. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 5(d) (Sch 4 as substituted: see note 3 supra). As regards actions in rem within the United Kingdom see also para 92 text and note 8 ante.

9 Case 365/88 *Kongress Agentur Hagen GmbH v Zeehaghe BV* [1990] ECR I-1845, ECJ.

UPDATE

93 Additional parties and related claims

NOTE 5--The High Court has exceptional jurisdiction to entertain a claim against a defendant domiciled in another member state where the claim is closely connected with a claim in a separate earlier action against a defendant domiciled in England: *Masri v Consolidated Contractors International (UK) Ltd* [2005] EWCA Civ 1436, [2006] 1 All ER (Comm) 465, [2006] 1 WLR 830. See *FKI Engineering Ltd v Dewind Holdings Ltd* [2008] EWCA Civ 316, [2009] 1 All ER (Comm) 118.

NOTE 6--The Brussels Convention art 6 para 2 is applicable to third party proceedings between insurers based on multiple insurance, in so far as there is a sufficient connection between the original proceedings and the third party proceedings to support the conclusion that the choice of forum does not amount to an abuse: Case C-77/04 *Groupement d'intérêt économique (GIE) Réunion européenne v Zurich España* [2006] 1 All ER (Comm) 488, ECJ.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(2) JURISDICTIONAL PROVISIONS OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/(vi) Discretion/94. Discretion in the exercise of jurisdiction under the 'Brussels I' Regulation and the Brussels or Lugano Conventions.

(vi) Discretion

94. Discretion in the exercise of jurisdiction under the 'Brussels I' Regulation and the Brussels or Lugano Conventions.

It is established that, where the 'Brussels I' Regulation or the Brussels or Lugano Convention¹ applies, there is no room for discretion on the part of national courts to decline jurisdiction in favour of the courts of another Regulation state or contracting state². However, neither the 'Brussels I' Regulation nor the Brussels and Lugano Conventions contain explicit provisions to regulate the relationship between the courts of Regulation states or contracting states (on the one hand) and the courts of non-Regulation states or non-contracting states (on the other). In such circumstances, it is not clear whether the uniform rules given in the Regulation and Conventions should be extended to remedy this or whether the area is one where the discretion of the national courts might be expected to operate³.

In cases where the natural forum is in a non-Regulation state or a non-contracting state, the doctrine of forum non conveniens is taken to be not inconsistent with the Regulation or Conventions, even where the English court has jurisdiction by virtue of the rules contained therein and where this jurisdiction has been invoked by the claimant⁴.

Furthermore, where a jurisdiction agreement giving jurisdiction to the courts of a non-Regulation state or non-contracting state is broken, the power of a court to exercise its procedural power to stay its proceedings also appears to be unaffected by the Conventions, even though, but for the jurisdiction agreement, the court would have jurisdiction over the defendant according to the rules of the 'Brussels I' Regulation and the Conventions; accordingly, a stay may be ordered in favour of the courts of the nominated state⁵.

The English courts may also decline jurisdiction even where the Regulation or Conventions apply in order to prevent an abuse of process⁶.

1 As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

2 See *Lafu Office and International Business SL v Meriden Animal Health Ltd* [2001] 1 All ER (Comm) 54, [2000] 2 Lloyd's Rep 51 (a court is not empowered to stay proceedings, in the exercise of its case management powers under CPR Pt 3, if it undermines the jurisdictional régime established by the Brussels Convention). As to the discretionary grounds permitted by English national procedural law see para 130 et seq post. As to jurisdiction under the 'Brussels I' Regulation and the Conventions see para 65 et seq ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

As a court which stays its proceedings remains seised of them (see *ROFA Sport Management AG v DHL International (UK) Ltd* [1989] 2 All ER 743, [1989] 1 WLR 902, CA), the other court, being the court seised second, would not have jurisdiction in any event: see para 128 post. It is possible, however, that the court retains a power to stay proceedings on the ground that they are an abuse of the process of the court, because the remedy is in such a case part of national procedural law, which the 'Brussels I' Regulation and Conventions are not intended to affect: see *Case C-365/88 Kongress Agentur Hagen GmbH v Zeehaghe BV* [1990] ECR I-1845, ECJ.

For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

3 The English courts have favoured the discretionary approach: see eg *Re Polly Peck (No 2)* [1998] 3 All ER 812 at 830. See also the cases cited in note 4 infra. For criticism of this approach see Cheshire and North *Private International Law* (13th Edn, 1999) pp 264-265.

4 *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72, [1991] 4 All ER 334, CA (company carried on business exclusively in Argentina but had an English domicile); *The Po* [1991] 2 Lloyd's Rep 206, CA; *The Nile Rhapsody* [1992] 2 Lloyd's Rep 399 (affd [1994] 1 Lloyd's Rep 382, CA); *Eli Lilly & Co v Nordisk A/S* [2000] IL Pr 73; *Ace Insurance SA-NV v Zurich Insurance Co* [2001] EWCA Civ 173, [2001] 1 Lloyd's Rep 618 (doctrine of forum non conveniens not necessarily inconsistent with the Lugano Convention). See also Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 393-394. See further para 129 post. When the decision in *Re Harrods (Buenos Aires) Ltd* supra was appealed to the House of Lords, a reference was made to the European Court, but the case was settled and the reference withdrawn. However, the question has been submitted again to the European Court, consequent to *Owusu v Jackson (t/a Villa Holidays Ball-Inn Villas)* [2002] EWCA Civ 877, [2002] All ER (D) 130 (Jun) and *American Motor Insurance Co v Cellstar Corp* [2003] EWCA Civ 206, [2003] All ER (D) 26 (Mar) (both of which relate to the Brussels Convention). At the date at which this volume states the law, no ruling has been made by the European Court in either case. It therefore remains a possibility that once a claimant has lawfully invoked jurisdiction in accordance with the 'Brussels I' Regulation or the Conventions, the English court may be bound in law to hear the case and may have no discretion to decline to do so.

As between the courts of England and Scotland the common law principle of forum non conveniens applies, and the statutory mechanism (found in the 'Brussels I' Regulation) is not applicable: see the Civil Jurisdiction and Judgments Act 1982 s 2, Sch 4 (substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt II para 4). There is, however, doubt on this point: see *Foxen v Scotsman Publications Ltd* [1995] EMLR 145 (not followed in *Cumming v Scottish Daily Record and Sunday Mail Ltd* [1995] EMLR 538).

As to the situation that arises where the subject matter of proceedings falls within the scope of the 'Brussels I' Regulation or the Conventions but the rules fail to allocate jurisdiction see *The Xin Yang* [1996] 2 Lloyd's Rep 217; *Sarrio SA v Kuwait Investment Authority* [1997] 1 Lloyd Rep 113, CA (revsd [1999] AC 32, [1997] 4 All ER 929, HL).

5 *The Nile Rhapsody* [1994] 1 Lloyd's Rep 382, CA.

It is clear, however, that where such a clause gives jurisdiction to a court in a Regulation state or contracting state, and where the clause conforms to the formal requirements of art 17 of the Conventions or art 23 of the 'Brussels I' Regulation (as to which see para 79 ante), the nominated court has exclusive jurisdiction and the other court must decline jurisdiction. The other court has no power simply to stay proceedings, but if the defendant does not object to the breach of the jurisdiction clause, the court will acquire jurisdiction by the entry of an appearance, pursuant to art 18 of the Conventions or art 24 of the 'Brussels I' Regulation: Case 150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] ECR 1671, [1982] 3 CMLR 1, ECJ. The court seised will determine whether the dispute in question falls within the scope of the clause as a matter of construction: Case C-214/89 *Powell Duffryn plc v Petereit* [1992] ECR I-1745, ECJ.

6 See *Boss Group Ltd v Boss France SA* [1997] 1 WLR 351.

UPDATE

94 Discretion in the exercise of jurisdiction under the 'Brussels I' Regulation and the Brussels or Lugano Conventions

NOTE 2--See also *Mahme Trust v Lloyds TSB Bank plc* [2004] EWHC 1931 (Ch), [2004] 2 Lloyd's Rep 637.

NOTE 5--See also *Konkola Copper Mines plc v Coromin* [2005] EWHC 898 (Comm), [2005] 2 All ER (Comm) 637, affirmed at [2006] EWCA Civ 5, [2006] 1 All ER (Comm) 437 (proceedings brought in contravention of exclusive jurisdiction agreement in favour of court of non-Regulation and non-contracting state; court should apply its own conflict rules; English courts therefore had discretion to stay proceedings).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/95. In general.

(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES

95. In general.

The fundamental principle of jurisdiction as it is exercised under the rules of the common law is that a defendant who is liable to be served with a claim form, whether within¹ or out of² the jurisdiction, is subject to the jurisdiction of the court³.

1 See para 96 post.

2 See para 97 et seq post.

3 See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 291-295. As to whether a court which has jurisdiction over the defendant may be entitled to decline to exercise it see para 131 post. In this sense, the rules of the 'Brussels I' Regulation and of the Brussels and Lugano Conventions, and subordinate legislation relating to them, may be seen as a partial definition or redefinition of whether it is lawful to serve process upon a defendant. As to service generally see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq. For the subordinate legislation see CPR 6.19-6.20. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/96. Defendant present within the jurisdiction.

96. Defendant present within the jurisdiction.

If the defendant is present within the jurisdiction of the court, he is liable to be served with the claim form in an action in personam¹. In relation to the existence of jurisdiction, it is irrelevant that his presence is fleeting, or that the dispute in question has no real or substantial connection with England².

1 As to service generally see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq.

2 *Maharanees of Baroda v Wildenstein* [1972] 2 QB 283, [1972] 2 All ER 689, CA; cf *Adams v Cape Industries plc* [1990] Ch 433, [1991] 1 All ER 929, CA. In such a case, however, it may be open to a court, upon the defendant's application, to stay its proceedings in favour of a court with a closer connection with the dispute or with the parties: see para 131 post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/97. Defendant out of the jurisdiction.

97. Defendant out of the jurisdiction.

The circumstances in which the process of the court may be served out of the jurisdiction¹, and the practice and procedure to be followed, are largely governed by the rules of civil procedure². Service out of the jurisdiction is treated as the exercise by the English court of judicial power over a foreigner who owes no allegiance to England or over a person who is resident or domiciled out of the jurisdiction, but is nevertheless called upon to answer claims made against him in England³. However, since the exercise of judicial power over such persons in other countries is prima facie a trespass upon the sovereignty of the other country⁴, a claimant is not entitled as of right, save for specified and extremely significant exceptions⁵, to issue and serve judicial process out of the jurisdiction: he must first obtain the permission of the court to do so⁶. Where application for such permission is made, the court will not give permission unless satisfied that England is the proper place in which to bring the claim⁷.

1 'Jurisdiction' refers to the territorial jurisdiction of the High Court: *Re Smith* (1876) 1 PD 300; *The Fagernes* [1927] P 311, CA.

2 See CPR 6.18-6.20; and para 99 et seq post. As to service generally see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq. As to the service out of the jurisdiction of a claim form in certain Admiralty actions in personam see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 188. However, there can be no service out of the jurisdiction of a claim form in an Admiralty action in rem: see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 160.

3 *Société Générale de Paris v Dreyfus Bros* (1885) 29 ChD 239 at 242; *The Hagen* [1908] P 189, CA; *Wyller v Lyons* [1963] P 274, [1963] 1 All ER 821. As to the meanings of 'England', 'English' and 'English law' for the purposes of this title see para 4 ante.

4 See CPR 6.24(2), which provides that nothing in CPR 6.24(1) or in any court order authorises or requires any person to do anything in the country where the claim form is to be served which is against the law of that country. See also CIVIL PROCEDURE vol 11 (2009) PARA 173.

5 For cases in which permission is not required see para 119 post. Most such cases are founded on the jurisdictional provisions of an international convention to which the United Kingdom is party: see para 119 post. For the meaning of 'United Kingdom' see para 4 ante. If the court has jurisdiction pursuant to the 'Brussels I' Regulation or pursuant to the Brussels or Lugano Convention, the claim form may be served without the permission of the court: see CPR 6.19; and para 119 post. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

6 See CPR 6.20; and para 99 et seq post.

7 CPR 6.21(2A); and see *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, [1993] 4 All ER 456, HL; and para 117 post.

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/98. Permission of the court required for service out of the jurisdiction.

98. Permission of the court required for service out of the jurisdiction.

Service of a claim form¹ out of the jurisdiction may be made with the permission of the court² in a number of specified cases³, but always provided that:

- 37 (1) the claim form does not contain a claim over which the court has jurisdiction by reason of the 'Brussels I' Regulation or the Brussels Convention or the Lugano Convention⁴ or by virtue of any other enactment⁵; and
- 38 (2) the claim form does not contain a claim suitable for an Admiralty action⁶.

Under the former procedural rules⁷, if it was unclear whether, or it was disputed that, a claim made by the claimant fell within the definition of the particular rule upon which reliance was placed, the doubt was resolved as follows:

- 39 (a) a question whether the admitted facts fall within the rule, was a question as to the legal construction of statutory words, and the court determined for itself the correct interpretation⁸;
- 40 (b) if it was disputed that the facts of the case, which if admitted would have brought the case within the rule, were sufficiently shown, the claimant was required to demonstrate a good arguable case that the relevant facts were as he alleged them to be⁹.

Where the permission of the court is required for a claim form to be served out of the jurisdiction, the permission of the court must also be obtained for service out of the jurisdiction of any other document to be served in the proceedings¹⁰.

1 As to service generally see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq.

2 As to applications for permission see para 116 post.

3 For these cases see CPR 6.20(1)-(18); and paras 99-114 post.

4 As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

5 Where the court does have jurisdiction pursuant to the 'Brussels I' Regulation or the Brussels or Lugano Convention service of the claim form out of the jurisdiction is permissible as of right; as to this and other jurisdiction founded on other enactments in respect of which service out of the jurisdiction is available as of right see para 119 post.

6 See SHIPPING AND MARITIME LAW vol 93 (2008) PARA 188.

7 I.e. the Rules of the Supreme Court. These rules have been superseded by the CPR: see CIVIL PROCEDURE vol 11 (2009) PARA 24 et seq. As to the weight to be given to cases concerning matters of civil procedure decided before 26 April 1999 (i.e. the date on which the CPR came into force) see CIVIL PROCEDURE vol 11 (2009) PARA 30.

8 *EF Hutton & Co (London) Ltd v Moffarj* [1989] 2 All ER 633 at 639, [1989] 1 WLR 488 at 495, CA.

9 *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, [1993] 4 All ER 456, HL; *Agrafax Public Relations Ltd v United Scottish Society Inc* [1995] IL Pr 753, CA. The claimant must demonstrate

in relation to the merits of the claim that there is a serious issue to be tried: *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* supra; and see further para 117 post.

10 CPR 6.30(2). See CIVIL PROCEDURE vol 11 (2009) PARA 156.

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/99. Defendant domiciled within the jurisdiction.

99. Defendant domiciled within the jurisdiction.

A claim form may be served out of the jurisdiction with the permission of the court¹ if a claim is made for a remedy² against a person domiciled³ within the jurisdiction⁴.

¹ As to applications for permission see para 116 post. As to service generally see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq.

² This provision is very wide and includes any relief in respect of any legal claim, whether it sounds in contract or tort or quasi-contract or declaration or other remedy such as rectification or rescission. It does not matter for this purpose where the contract was made or where the cause of action arose, whether within or out of the jurisdiction: *Lenders v Anderson* (1883) 12 QBD 50; *Hadad v Bruce* (1892) 8 TLR 409. The basis of this jurisdiction is the domicile of the person against whom the relief is sought: see *Re Liddell's Settlement Trusts* [1936] Ch 365, [1936] 1 All ER 239, CA.

³ 'Domicile' in this provision means: (1) in relation to a contracting state, a domicile as defined in the Civil Jurisdiction and Judgments Act 1982 ss 41-46 (as amended); and (2) in relation to a Regulation state, a domicile as defined in accordance with the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 paras 9-12: CPR 6.18(g). See paras 80 note 9, 81 note 10, 82 note 8, 84-87 ante. For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

⁴ CPR 6.20(1). This rule will be applicable only rarely, for, in a civil or commercial matter, a defendant domiciled in the United Kingdom falls within the jurisdictional regime of the 'Brussels I' Regulation or the Brussels or Lugano Convention, and service upon him will, in principle, be as of right, and will not require the permission of the court: see CPR Pt 19; and paras 71 ante, 119 post. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. For the meaning of 'United Kingdom' see para 4 ante.

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/100. Injunctions.

100. Injunctions.

A claim form may be served out of the jurisdiction with the permission of the court¹ if a claim is made for an injunction² ordering the defendant to do or refrain from doing an act within the jurisdiction³.

¹ As to applications for permission see para 116 post. As to service generally see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq.

² This does not include an interim injunction: *Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210, [1977] 3 All ER 803, HL. As the claim for an interim injunction is not by itself a cause of action, service of the claim form on the defendant out of the jurisdiction will not be possible if this is the only claim which is advanced against him. If it is sought to obtain an interim injunction against a defendant out of the jurisdiction, it must be shown that there is another head of CPR 6.20 which applies to the claim made against him: *Siskina (Cargo Owners) v Distos Compania Naviera SA* supra; *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, [1993] 1 All ER 664, HL. If no such claim is advanced (the applicant seeking only an asset-freezing order (formerly called a 'Mareva injunction', following *Mareva Cia Naviera SA v International Bulkcarriers SA*, *The Mareva* [1980] 1 All ER 213n, CA) to preserve assets against which a foreign judgment will later be enforced), the claim does not fall within the rule: *Mercedes-Benz AG v Leiduck* [1996] AC 284, [1995] 3 All ER 929, PC. See also *Qingdao Ocean Shipping Co v Grace Shipping Establishment, Transatlantic Schifffahrtskontor GmbH, Ode and Heath Chartering (UK) Ltd, The Xing Su Hai* [1995] 2 Lloyd's Rep 15. The Civil Jurisdiction and Judgments Act 1982 s 25 (as amended) authorises interim relief to be granted in a case in which the dispute between the parties will be heard in the courts of another contracting state to the Brussels Convention or to the Lugano Convention: see further para 138 post. In such a case it is unclear whether the claim form may be served out of the jurisdiction under CPR 6.20(2); under the equivalent rule of the former Rules of the Supreme Court, it was held that it could be so served (see *X v Y* [1990] 1 QB 220, [1989] 3 All ER 689), but this was doubted in *Mercedes-Benz AG v Leiduck* supra. As to the weight to be given to cases concerning matters of civil procedure decided before 26 April 1999 (ie the date on which the CPR came into force) see CIVIL PROCEDURE vol 11 (2009) PARA 30.

³ CPR 6.20(2). The act to be restrained or ordered must be one within the jurisdiction: *Kinahan v Kinahan* (1890) 45 ChD 78; *Re De Penny, De Penny v Christie* [1891] 2 Ch 63 at 68-69.

Under the former procedural rules, a claim that the defendant be required to account within the jurisdiction, or that he be ordered to pay money within the jurisdiction, did not fall within the rules: *ISC Technologies Ltd v Guerin* [1992] 2 Lloyd's Rep 430. Nor did the rules extend to the service on a foreigner out of the jurisdiction of a process claiming only 'Mareva' relief (as to which see note 2 supra) (*Mercedes-Benz AG v Leiduck* [1996] AC 284, [1995] 3 All ER 929, PC); nor where the claimants sought to restrain one of the defendants from pursuing proceedings out of the jurisdiction and from pursuing the claims it sought to make there anywhere other than in England (*Amoco (UK) Exploration Co v British American Offshore Ltd* [1999] 2 All ER (Comm) 201, [1999] 2 Lloyd's Rep 772). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/101. Necessary or proper parties.

101. Necessary or proper parties.

A claim form may be served out of the jurisdiction with the permission of the court¹ if a claim² is made against someone on whom the claim form has been or will be served³ and:

- 41 (1) there is between the claimant and that person a real issue which it is reasonable for the court to try⁴; and
- 42 (2) the claimant wishes to serve the claim form on another person who is a necessary or proper party⁵ to that claim⁶.

In addition, a claim form may be served out of the jurisdiction with the permission of the court if the claim is made against a person not a party to the original proceedings⁷ and the person to be served is a necessary and proper party to the claim⁸.

1 As to applications for permission see para 116 post.

2 This applies equally to a counterclaim: *Derby & Co Ltd v Larsson* [1976] 1 All ER 401, [1976] 1 WLR 202, HL. As to the weight to be given to cases concerning matters of civil procedure decided before 26 April 1999 (ie the date on which the CPR came into force) see CIVIL PROCEDURE vol 11 (2009) PARA 30.

3 As to service of a claim form generally see CIVIL PROCEDURE vol 11 (2009) PARAS 139-155.

4 CPR 6.20(3)(a). This guards against the possibility of a claimant attempting to get one defendant before the court simply as a pretext then to join the intended defendant as a party: see *Witted v Galbraith* [1893] 1 QB 577.

5 Where claims against multiple defendants involve common questions of fact and arise out of the same series of transactions, each defendant is regarded as a necessary and proper party for the purposes of CPR 6.20(3): *United Film Distribution Ltd v Chhabria* [2001] EWCA Civ 416, [2001] 2 All ER (Comm) 865.

6 CPR 6.20(3)(b). The width of this provision (and the associated provision given in the text and notes 7-8 infra) is such that the court should be careful to see that it is not abused: *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258, [1983] 2 All ER 563, CA; *Golden Ocean Assurance Ltd v Martin, The Goldean Mariner* [1990] 2 Lloyd's Rep 215, CA; *Petroleo Brasileiro SA v Mellitus Shipping Inc* [2001] EWCA Civ 418, [2001] 1 All ER (Comm) 993.

7 Ie a claim under the CPR Pt 20. As to Part 20 claims see CIVIL PROCEDURE vol 11(2009) PARA 618 et seq. Where the court is considering the grant of permission to serve proceedings out of the jurisdiction in relation to a question of contribution, the court must be guided by the interests of the parties and considerations of practical justice: *Petroleo Brasileiro SA v Mellitus Shipping Inc* [2001] EWCA Civ 418, [2001] 1 All ER (Comm) 933.

8 CPR 6.20(3A).

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

101 Necessary or proper parties

TEXT AND NOTE 3--le has been or will be served otherwise than in reliance on CPR 6.20(3): CPR 6.20(3) (amended by SI 2004/2072).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/102. Interim remedies under the Civil Jurisdiction and Judgments Act 1982.

102. Interim remedies under the Civil Jurisdiction and Judgments Act 1982.

A claim form may be served out of the jurisdiction with the permission of the court¹ if a claim is made under the Civil Jurisdiction and Judgments Act 1982² for an interim remedy³.

¹ As to applications for permission see para 116 post. As to service generally see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq.

² ie under the Civil Jurisdiction and Judgments Act 1982 s 25(1); see para 138 post.

³ CPR 6.20(4).

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/103. Contracts.

103. Contracts.

A claim form may be served out of the jurisdiction with the permission of the court¹ where a claim is made in respect of a contract and the following circumstances apply:

- 43 (1) the contract was made within the jurisdiction²; or
- 44 (2) the contract was made by or through an agent trading or residing within the jurisdiction³; or
- 45 (3) the contract is governed by English law⁴; or
- 46 (4) the contract contains a term to the effect that the court is to have jurisdiction to determine any claim in respect of the contract⁵.

Permission may also be given where a claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in heads (1) to (4) above⁶.

The court also has jurisdiction to give permission to serve a claim form out of the jurisdiction in respect of a breach of contract committed within the jurisdiction⁷.

1 As to applications for permission see para 116 post. As to service generally see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq.

2 CPR 6.20(5)(a). In accordance with principle, a contract is made where the offer is accepted: see *Cowan v O'Connor* (1888) 20 QBD 640, DC. In the case of telex communications, however, the contract is made at the place where the offeror receives the acceptance: *Entores Ltd v Miles Far East Corpn* [1955] 2 QB 327, [1955] 2 All ER 493, CA; *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34, [1982] 1 All ER 293, HL. See CONTRACT.

If a contract made within the jurisdiction is amended outside the jurisdiction, it is still treated as having been made within the jurisdiction unless a new agreement is made by the amendment: *BP Exploration Co (Libya) Ltd v Hunt* [1976] 3 All ER 879, [1976] 1 WLR 788.

3 CPR 6.20(5)(b). This includes a contract whose terms have been arranged through an agent who had no authority to bind his principal, the contract having been made with the principal himself: *National Mortgage and Agency Co of New Zealand Ltd v Gosselin and Stordeur* (1922) 38 TLR 832, CA. See also *Mauroux v Sociedade Comercial Abel Pereira da Fonseca SARL* [1972] 2 All ER 1085, [1972] 1 WLR 962. The rule is inapplicable where the principal of the agent is the claimant as opposed to the defendant: *Union International Insurance Co Ltd v Jubilee Insurance Co Ltd* [1991] 1 All ER 740, [1991] 1 WLR 415.

4 CPR 6.20(5)(c). For the provisions of law which determine whether a contract is governed by English law see para 349 et seq post. The law as set out in the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L226, 9.10.80, p 1) is applicable for these purposes: *Bank of Baroda v Vysya Bank Ltd* [1994] 2 Lloyd's Rep 87. The Rome Convention is set out in the Contracts (Applicable Law) Act 1990 s 2, Sch 1: see para 349 et seq post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

5 CPR 6.20(5)(d). This provision is equivalent to the 'Brussels I' Regulation art 23 and art 17 of the Conventions which govern jurisdiction in the circumstances described: see para 75 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante. For the meaning of 'the Conventions' see para 65 note 5 ante.

6 CPR 6.20(7). This provision addresses the problem which arose under the predecessor rule to CPR 6.20 (ie RSC Ord 11 r 1(1)(d)), which had been held not to apply where the claimant seeks a declaration that there was no contract: *Finnish Maritime Insurance Co Ltd v Protective National Insurance Co* [1990] 1 QB 1078, [1989] 2 All ER 929; not followed in *DR Insurance v Central National Insurance Co* [1996] 1 Lloyd's Rep 74. As to the weight to be given to cases concerning matters of civil procedure decided before 26 April 1999 (ie the date on which the CPR came into force) see CIVIL PROCEDURE vol 11 (2009) PARA 30.

7 CPR 6.20(6). Under predecessor rules of court, the court had to be satisfied, the breach being assumed, that there was a good arguable case that it was committed within the jurisdiction: see *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, [1993] 4 All ER 456, HL; *Agrafax Public Relations Ltd v United Scottish Society Inc* [1995] IL Pr 753, CA. Failure to pay a debt due to a claimant in England was held to be a breach within the jurisdiction (*Robey v Snaefell Mining Co* (1887) 20 QBD 152, DC; *The Eider* [1893] P 119, CA; *Thompson v Palmer* [1893] 2 QB 80, CA), as was the dismissal of an employee by a letter posted in England (*Oppenheimer v Louis Rosenthal & Co* [1937] 1 All ER 23, CA).

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

103 Contracts

NOTES 2, 4--CPR 6.20(5) applies to a claim in respect of the performance of an oral agreement: *Albon (t/a N A Carriage Co) v Naza Motor Trading SDN BHD* [2007] EWHC 9 (Ch), [2007] 2 All ER 719.

NOTE 2--See *Cherney v Deripaska* [2009] EWCA Civ 849, [2009] All ER (D) 02 (Aug).

NOTES 4, 5--See *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] EWHC 3418 (Comm), [2004] 1 Lloyd's Rep 731.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/104. Torts.

104. Torts.

A claim form may be served out of the jurisdiction with the permission of the court¹ if a claim is made in tort where the damage was sustained, or resulted from an act committed, within the jurisdiction².

¹ As to applications for permission see para 116 post. As to service generally see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq.

² CPR 6.20(8).

The drafting of this rule reflects the wording which finds expression in the 'Brussels I' Regulation art 5 para 3; the Brussels Convention art 5 para 3; the Lugano Convention art 5 para 3; and the Civil Jurisdiction and Judgments Act 1982 s 16(1) (as amended), Sch 4 rule 3(c) (as substituted): see para 91 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

Characterisation of the cause of action as founded in tort may raise problems if the cause of action is not a tort according to English law. The Private International Law (Miscellaneous Provisions) Act 1995 s 9(2) (see para 368 post) provides for a claim to be characterised as a tort for the purposes of the conflict of laws, but this does not solve all the problems that may arise: see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1517-1519; and Cheshire and North *Private International Law* (13th Edn, 1999) pp 618-622. Furthermore, it is possible that a distinction exists between where damage occurred and where it was sustained: see para 91 note 6 ante. If CPR 6.20(8) is to be interpreted to conform to the provisions of the 'Brussels I' Regulation and the Conventions (and there may be dangers in doing so too freely: see Cheshire and North *Private International Law* (13th Edn, 1999) p 620), it may be necessary to read 'sustained' as 'occurred'. The question of where the tort occurred is determined by choice of law rules which are predicated upon the location of a tort; the test is where in substance the cause of action arose: see further para 367 et seq post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

As to tort generally see TORT. See also NEGLIGENCE; NUISANCE.

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

104 Torts

TEXT AND NOTE 2--'Damage' means harm which has been sustained by the claimant, and not damage which completes the cause of action: *Booth v Phillips* [2004] EWHC 1437 (Comm), [2004] 2 Lloyd's Rep 457 (claimant's husband killed in accident in Egypt; claimant resident in England and so damages sustained by her sustained in England).

NOTE 2--A decision, based on a fraudulent misrepresentation, to engage solicitors which is made within the jurisdiction does not provide the necessary connecting factors for permission to be granted under CPR 6.20(8): *Newsat Holdings Ltd v Zani* [2006] EWHC 342 (Comm), [2006] 1 All ER (Comm) 607.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/105. Enforcement of judgments or arbitral awards.

105. Enforcement of judgments or arbitral awards.

A claim form may be served out of the jurisdiction with the permission of the court¹ where a claim is made to enforce any judgment or arbitral award².

¹ As to applications for permission see para 116 post.

² CPR 6.20(9). Where enforcement of a judgment by registration (see para 166 et seq post) is available, the personal jurisdiction of the English court over the judgment debtor is irrelevant. But where the judgment or award is required to be enforced by action, service out of the jurisdiction may be made under this head: see further para 140 et seq post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

This head does not give jurisdiction for service where the only relief claimed is an asset-freezing order (formerly called a 'Mareva injunction', following *Mareva Cia Navera SA v International Bulkcarriers SA, The Mareva* [1980] 1 All ER 213n, CA), because such relief is not brought to enforce a judgment; nor is it available if the judgment has not yet been given: *Mercedes-Benz AG v Leiduck* [1996] AC 284, [1995] 3 All ER 929, PC. As to arbitration awards generally see ARBITRATION.

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/106. Property within the jurisdiction.

106. Property within the jurisdiction.

A claim form may be served out of the jurisdiction with the permission of the court¹ where the whole subject matter of a claim relates to property located within the jurisdiction².

¹ As to applications for permission see para 116 post.

² CPR 6.20(10). For these purposes, property includes intangible property as well as immovable and tangible property: see *Re Banco Nacional de Cuba* [2001] 3 All ER 923, [2001] 1 WLR 2039 (shares in an English incorporated company allegedly transferred at an undervalue). As to exclusive jurisdiction in such matters under the 'Brussels I' Regulation and the Brussels and Lugano Conventions see para 75 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/107. Trusts.

107. Trusts.

A claim form may be served out of the jurisdiction with the permission of the court¹ where a claim is made for any remedy which might be obtained in proceedings to execute the trusts of a written instrument where: (1) the trusts ought to be executed according to English law²; and (2) the person on whom the claim form is to be served is a trustee of the trusts³.

1 As to applications for permission see para 116 post.

2 CPR 6.20(11)(a). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 CPR 6.20(11)(b). It is not necessary that there be some property which is subject to the trust instrument which is situated within the jurisdiction: cf *Winter v Winter* [1894] 1 Ch 421. See generally TRUSTS.

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/108. Administration actions.

108. Administration actions.

A claim form may be served out of the jurisdiction with the permission of the court¹ where a claim is made for any remedy which might be obtained in proceedings for the administration of the estate of a person who died domiciled² within the jurisdiction³.

1 As to applications for permission see para 116 post.

2 'Domicile' in this provision means: (1) in relation to a contracting state, a domicile as determined in accordance with the Civil Jurisdiction and Judgments Act 1982 ss 41-46 (as amended); and (2) in relation to a Regulation state, a domicile as determined in accordance with the 'Brussels I' Regulation and the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 paras 9-12: CPR 6.18(g). See paras 80 note 9, 81 note 10, 82 note 8, 84-87, 99 ante. For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

3 CPR 6.20(12). As to administration of estates generally see EXECUTORS AND ADMINISTRATORS.

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/109. Probate proceedings.

109. Probate proceedings.

A claim form may be served out of the jurisdiction with the permission of the court¹ where a claim is made in probate proceedings which includes a claim for the rectification of a will².

¹ As to applications for permission see para 116 post.

² CPR 6.20(13). As to probate actions see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 72 et seq. As to rectification of a will see WILLS vol 50 (2005 Reissue) para 408.

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/110. Constructive trusteeship.

110. Constructive trusteeship.

A claim form may be served out of the jurisdiction with the permission of the court¹ where a claim is made for a remedy against the defendant as constructive trustee where the defendant's alleged liability arises out of acts committed within the jurisdiction².

¹ As to applications for permission see para 116 post.

² CPR 6.20(14). As long as some of the acts upon which liability is said to arise occurred within the jurisdiction, it is unnecessary for the actual receipt of money to have occurred within the jurisdiction: *ISC Technologies Ltd v Guerin* [1992] 2 Lloyd's Rep 430 (and see para 100 note 3 ante); *Polly Peck International plc v Nadir* (1992) Independent, 2 September. See also *United Film Distribution Ltd v Chhabria* [2001] EWCA Civ 416, [2001] 2 All ER (Comm) 865 (it is not essential for the defendant to have acquired within the jurisdiction the knowledge upon which a claim to enforce an alleged constructive trust is based). As to constructive trusts generally see TRUSTS vol 48 (2007 Reissue) para 687 et seq. As to actions for money had and received see RESTITUTION vol 40(1) (2007 Reissue) para 5.

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/111. Restitution.

111. Restitution.

A claim form may be served out of the jurisdiction with the permission of the court¹ where a claim is made for restitution where the defendant's alleged liability arises out of acts committed within the jurisdiction².

1 As to applications for permission see para 116 post.

2 CPR 6.20(15).

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/112. Taxes and duties.

112. Taxes and duties.

A claim form may be served out of the jurisdiction with the permission of the court¹ where a claim is made by the Commissioners of the Inland Revenue relating to duties or taxes against a defendant not domiciled² in Scotland or Northern Ireland³.

1 As to applications for permission see para 116 post.

2 'Domicile' in this provision means: (1) in relation to a contracting state, a domicile as determined in accordance with the Civil Jurisdiction and Judgments Act 1982 ss 41-46 (as amended); and (2) in relation to a Regulation state, a domicile as determined in accordance with the 'Brussels I' Regulation and the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 paras 9-12: CPR 6.18(g). See paras 80 note 9, 81 note 10, 82 note 8, 84-87 ante.

3 CPR 6.20(16). See generally CAPITAL GAINS TAXATION; INCOME TAXATION; INHERITANCE TAXATION.

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

112 Taxes and duties

TEXT AND NOTES 2, 3--For 'Commissioners of the Inland Revenue' read 'Commissioners for Her Majesty's Revenue and Customs': CPR 6.20(16) (amended by SI 2005/2292).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/113. Costs in relation to third parties.

113. Costs in relation to third parties.

A claim form may be served out of the jurisdiction with the permission of the court¹ where a claim is made by a party to proceedings for an order that the court exercise its power² to make a costs order in favour of or against a person who is not a party to those proceedings³.

1 As to applications for permission see para 116 post.

2 ie under the Supreme Court Act 1981 s 51: see JUDICIAL REVIEW vol 61 (2010) PARA 681 et seq.

3 CPR 6.20(17). As to the procedure where the court is considering whether to exercise its discretion to make a costs order in favour of or against a non-party see CPR 48.2; and CIVIL PROCEDURE vol 12 (2009) PARA 1805.

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/114. Certain statutory claims.

114. Certain statutory claims.

A claim form may be served out of the jurisdiction with the permission of the court¹ where a claim is made under one of a number of specified enactments² namely:

- 47 (1) the Nuclear Installations Act 1965³;
- 48 (2) the Social Security Contributions and Benefits Act 1992⁴;
- 49 (3) EC Council Directive 76/308 of 15 March 1976⁵, where service is to be effected in a member state of the European Union⁶;
- 50 (4) the Drug Trafficking Offences Act 1994⁷;
- 51 (5) Pt VI of the Criminal Justice Act 1988⁸;
- 52 (6) the Immigration (Carriers' Liability) Act 1987⁹;
- 53 (7) Pt II of the Immigration and Asylum Act 1999¹⁰;
- 54 (8) certain provisions of the Immigration Act 1971¹¹; and
- 55 (9) the Financial Services and Markets Act 2000¹².

1 As to applications for permission see para 116 post.

2 A claim is made under enactments specified in *Practice Direction--Service out of the Jurisdiction* (2001) PD6B paras 5.1, 5.2: CPR 6.20(18).

3 *Practice Direction--Service out of the Jurisdiction* (2001) PD6B para 5.2(1). As to the making of claims under the Nuclear Installations Act 1965 see FUEL AND ENERGY vol 19(3) (2007 Reissue) para 1506.

4 *Practice Direction--Service out of the Jurisdiction* (2001) PD6B para 5.2(2). See SOCIAL SECURITY AND PENSIONS.

5 Ie EC Council Directive 76/308 (OJ L73, 19.03.76, p 18) on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties (as amended).

6 *Practice Direction--Service out of the Jurisdiction* (2001) PD6B para 5.2(3). As to service in a member state see CIVIL PROCEDURE vol 11 (2009) PARA 157 et seq.

7 *Practice Direction--Service out of the Jurisdiction* (2001) PD6B para 5.2(4).

8 Ie the Criminal Justice Act 1988 Pt VI (ss 71-102) (as amended) (confiscation of proceeds of an offence): *Practice Direction--Service out of the Jurisdiction* (2001) PD6B para 5.2(7).

9 *Practice Direction--Service out of the Jurisdiction* (2001) PD6B para 5.2(8). See BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 204.

10 Ie the Immigration and Asylum Act 1999 Pt II (ss 32-43): *Practice Direction--Service out of the Jurisdiction* (2001) PD6B para 5.2(9). See BRITISH NATIONALITY, IMMIGRATION AND ASYLUM.

11 Ie the provisions of the Immigration Act 1971 Sch 2 (as amended): *Practice Direction--Service out of the Jurisdiction* (2001) PD6B para 5.2(10). See BRITISH NATIONALITY, IMMIGRATION AND ASYLUM.

12 *Practice Direction--Service out of the Jurisdiction* (2001) PD6B para 5.2(11). See FINANCIAL SERVICES AND INSTITUTIONS.

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/115. Documents in arbitration proceedings.

115. Documents in arbitration proceedings.

Any arbitration claim form in an arbitration claim under the Arbitration Act 1950, or the Arbitration Act 1979, or any order made in such a claim, may be served out of the jurisdiction with the permission of the court, provided that the arbitration to which the claim relates is governed by English law¹ or has been, is being, or will be, held within the jurisdiction².

An arbitration claim form seeking permission to enforce an award may be served out of the jurisdiction with the permission of the court whether or not the arbitration is governed by English law³.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante. As to arbitration generally see ARBITRATION.

2 CPR 62.16(1). The rules relating to the method of service where a claim form is to be served out of the jurisdiction (see CPR 6.24; and CIVIL PROCEDURE vol 11 (2009) PARA 173), service through foreign governments, judicial authorities and British consular authorities (see CPR 6.25-6.26; and CIVIL PROCEDURE vol 11 (2009) PARAS 175-176), service in accordance with EC Council Regulation 1348/2000 (OJ L160, 30.06.2000, p 37) on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (see CPR 6.26A; and CIVIL PROCEDURE vol 11 (2009) PARAS 157 et seq, 174), service of a claim form on a state (see CPR 6.27; and CIVIL PROCEDURE vol 11 (2009) PARA 177), the translation of a claim form (see CPR 6.28; and CIVIL PROCEDURE vol 11 (2009) PARA 178), and the undertaking to be responsible for expenses of the Foreign and Commonwealth Office (see CPR 6.29; and CIVIL PROCEDURE vol 11 (2009) PARA 179), apply to the service of an arbitration claim form under CPR 62.16(1) (see supra): CPR 62.16(4). The application for permission to serve an arbitration claim form out of the jurisdiction must be supported by written evidence stating the grounds on which the application is made and showing in what place or country the person to be served is, or probably may be found: CPR 62.16(3). See para 116 post. An order giving permission to serve an arbitration claim form out of the jurisdiction must specify the period within which the defendant may file an acknowledgment of service: CPR 62.16(5).

3 CPR 62.16(2).

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

115 Documents in arbitration proceedings

NOTE 2--From 13 November 2008, Regulation 1348/2000 repealed and replaced by European Parliament and EC Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (service of documents).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/116. Form of application for permission to serve claim form out of jurisdiction.

116. Form of application for permission to serve claim form out of jurisdiction.

An application for permission for service out of the jurisdiction¹ must be supported by written evidence², which must state:

- 56 (1) the grounds on which the application is made³;
- 57 (2) that the claimant believes that his claim has a reasonable prospect of success⁴; and
- 58 (3) the defendant's address or, if not known, in what place or country the defendant is, or is likely, to be found⁵.

If the application is made in respect of joining a person as a necessary or proper party to the claim⁶, the written evidence must also state the grounds on which the witness believes that there is between the claimant and the person on whom the claim form has been, or will be served, a real issue which it is reasonable for the court to try⁷.

The order giving permission to serve a claim form out of the jurisdiction must specify the periods within which the defendant may file an acknowledgment of service, file or serve an admission, and file a defence⁸.

¹ ie under CPR 6.20: see para 99 et seq ante.

² CPR 6.21(1).

³ CPR 6.21(1)(a). The particular paragraph or paragraphs of CPR 6.20 upon which the claimant relies (as to which see para 99 et seq ante) must also be stated: CPR 6.21(1)(a).

The claimant who appears to have advanced the claim to jurisdiction upon a particular ground should not be permitted at the hearing of the application to advance a different or additional ground which has not been foreshadowed: *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, [1989] 3 All ER 14, CA. See also *Parker v Schuller* (1901) 17 TLR 299, CA.

⁴ CPR 6.21(1)(b).

⁵ CPR 6.21(1)(c). As to service on a defendant domiciled or ordinarily resident in Scotland or Northern Ireland see para 118 post.

⁶ ie in respect of a claim referred to in CPR 6.20(3) (see para 101 ante): CPR 6.21(2).

⁷ CPR 6.21(2). See *New Hampshire Insurance Co v Aerospace Finance Ltd* [1998] 2 Lloyd's Rep 539.

⁸ CPR 6.21(4). The period for responding to service depends upon the place or country where the process is to be served: see *Practice Direction--Service out of the Jurisdiction* (2001) PD6B para 8.1, Table.

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/117. Discretion to give permission.

117. Discretion to give permission.

Where, on an application for permission for service out of the jurisdiction, the court has determined that, on the material before it, it has jurisdiction to give permission¹, nevertheless the court will not give permission unless it is satisfied that England is the proper place in which to bring the claim². On this question it must be shown by the claimant that England is, clearly or distinctly, the most appropriate forum (the forum conveniens) for the hearing of the dispute³; and if it is, the claimant must further show that he has, on the merits of the case he advances against the defendant, a serious issue to be tried⁴.

1 It is that the case falls within the requisite head of CPR 6.20: see para 99 et seq ante. The absence of financial assistance available to a claimant in the appropriate forum will be relevant to the question of whether service out of jurisdiction ought to be permitted only in exceptional circumstances: *Hewitson v Hewitson* [1999] 2 FLR 74.

2 CPR 6.21(2A). It is for the claimant to show that the case against the defendant is a proper one for service out of the jurisdiction: *New Hampshire Insurance Co v Aerospace Finance Ltd* [1998] 2 Lloyd's Rep 539 (service of concurrent claim set aside on the ground that it was obviously not a proper case for service out of the jurisdiction). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, [1986] 3 All ER 843, HL. This is a distinct and essential aspect of the statutory requirement that the case be a proper one for service out of the jurisdiction: *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, [1993] 4 All ER 456, HL. Earlier cases, which had suggested that this requirement did not strictly need to be satisfied if the claimant had an extremely strong claim on the merits, are not reliable: see *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* supra at 456 and 467. Upon the question whether the claimant has shown England to be, clearly or distinctly, the natural forum see the cases on stays of proceedings cited in para 131 post, in which the same analysis is undertaken by the defendant who seeks a stay of English proceedings. The cases in which the concept of the natural forum has been developed differ only on the question of whether it is the defendant who must show a foreign court to be (in a stay application) the natural forum, or the claimant who must show England to be (in an application for permission to serve out of the jurisdiction) the natural forum. Although the fact that English law is the *lex causae* (see para 11 ante) may be thought to be a good reason for considering England to be the natural forum, the court should not lightly hold that this follows from the fact that businessmen have expressly selected English law (but without a choice of forum) to govern their contract: *Spiliada Maritime Corp v Cansulex Ltd* supra at 481-482 and 859. See also *Tate & Lyle Industries Ltd v Cia Usina Bulhoes* [1997] 1 Lloyd's Rep 355, CA (the appropriate way of seeking to freeze a fund which only exists abroad and which has no connection with England is to take appropriate proceedings in the jurisdiction where the debtor can be found or where the fund exists); *Sinochem International Oil (London) Ltd v Mobil Sales and Supply Corp Ltd (Sinochem International Oil Co Ltd, third party)* [2000] 1 Lloyd's Rep 670.

As to the discretion of the court in a case involving an exclusive foreign jurisdiction clause where the time limit for bringing an action in the foreign proceedings has expired see *Citi-March Ltd v Neptune Orient Lines Ltd* [1996] 2 All ER 545.

4 *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, [1993] 4 All ER 456, HL. This appears to mean that the claim is strong enough to enable the court to exercise its discretion, before it goes on to consider the exercise of discretion: see *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* supra at 456 and 467.

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/118. Service in Scotland or Northern Ireland.

118. Service in Scotland or Northern Ireland.

Where an application is made¹ in England² for permission to serve a claim form in Scotland or Northern Ireland³, and it appears to the court that the claimant may also be entitled to a remedy there, the court, in deciding whether to give permission⁴, must compare the cost and convenience of proceeding there or in England⁵. For this purpose, 'convenience' is to be given a wide meaning, including, for example, where the parties and their witnesses live, where the relevant documents are, the possibility of double litigation, expedition or delay and the mode of enforcement⁶.

Where relevant, the court must also have regard to the powers and jurisdiction of the sheriff court in Scotland or the county courts or courts of summary jurisdiction in Northern Ireland⁷.

1 le under CPR 6.20: see paras 99-113 ante.

2 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 CPR 6.21(3)(a).

4 CPR 6.21(3)(b).

5 CPR 6.21(3)(b)(i). See, however, para 119 post. These considerations may be sufficient to persuade the court to refuse permission: see *Lenders v Anderson* (1883) 12 QBD 50; *The Elton* [1891] P 265 at 269; *Witted v Galbraith* [1893] 1 QB 577, CA; *Williams v Cartwright* [1895] 1 QB 142 at 146, CA, per Lord Esher MR.

6 See *Tozier v Hawkins* (1885) 15 QBD 680, CA; *Washburn & Moen etc Co v Cunard SS Co and JC Parker & Sons* (1889) 5 TLR 592; *Re Burland's Trade-Mark, Burland v Broxburn Oil Co* (1889) 41 ChD 542; *Re De Penny, De Penny v Christie* [1891] 2 Ch 63.

7 CPR 6.21(3)(b)(ii).

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/119. Service out of the jurisdiction where permission of the court is not required.

119. Service out of the jurisdiction where permission of the court is not required.

In certain cases, service may be made out of the jurisdiction without the permission of the court¹.

A claim form may be served on a defendant out of the jurisdiction where each claim included in the claim form made against the defendant to be served is a claim which the court has power to determine under the 'Brussels I' Regulation or under the Civil Jurisdiction and Judgments Act 1982². If the court has jurisdiction by virtue of any other enactment notwithstanding that the person against whom the claim is made is not within the jurisdiction or that the facts giving rise to the claim did not occur within the jurisdiction, service out is allowed without permission³.

1 CPR 6.19. See also *Union Bank of Finland v Lelakis* [1996] 4 All ER 305, CA (service out of the jurisdiction of orders ancillary to execution after judgment is valid if the proceedings are appropriate for service out of jurisdiction without permission). These cases, almost all of which owe their origins to international conventions to which the United Kingdom is party, are consequently very important. For the meaning of 'United Kingdom' see para 4 ante.

2 CPR 6.19(1), CPR 6.19(1A). Where a claim form is to be served out of the jurisdiction under this rule, it must contain a statement of the grounds on which the claimant is entitled to serve it out of the jurisdiction: CPR 6.19(3).

As to jurisdiction by reason of the Civil Jurisdiction and Judgments Act 1982, which contains the provisions of the Brussels and Lugano Conventions, as well as an analogous scheme for determining jurisdiction as between different parts of the United Kingdom derived from the 'Brussels I' Regulation', see paras 65-66 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. The scheme referred to will usually determine whether a defendant domiciled in Scotland or Northern Ireland may be sued in the English courts, and if he is so liable, permission will not be required for service (see para 118 ante). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

It is expressly required that:

- 23 (1) there are no proceedings between the parties concerning the same claim pending in the courts of any other part of the United Kingdom or any other Regulation state or contracting state (CPR 6.19(1)(a), (1A)(a)); and
- 24 (2) either: (a) the defendant is domiciled in the United Kingdom or in a Regulation state or Convention territory; or (b) the English court has jurisdiction by virtue either of the exclusive jurisdiction provisions of the Conventions (ie art 16) or the 'Brussels I' Regulation (ie art 22) or by virtue of the choice of court provisions of the Conventions (ie art 17) or the 'Brussels I' Regulation (ie art 23) (as to which see paras 75-76, 79 ante) (CPR 6.19(1)(b), (1A)(b)).

The effect is that jurisdiction which exists pursuant to the Regulation or the Conventions will entitle the claim form to be served out of the jurisdiction without permission, except where jurisdiction is based on art 4 of the Regulation or of the Conventions (see para 88 ante), for in such a case the conditions of CPR 6.19(1)(b) are not satisfied. As to references to numbered articles of the Conventions see para 65 note 8 ante.

CPR 6.19(1) uses the term 'Convention territory' rather than 'contracting state' to indicate that certain territories of contracting states were excluded from the Brussels Convention, but art 60 of that Convention, which specified the excluded territories, is now repealed (see the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 1990, SI 1990/2591).

3 CPR 6.19(2).

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/120. Mode of service out of the jurisdiction: general.

120. Mode of service out of the jurisdiction: general.

Where a claim form is to be served out of the jurisdiction¹, it may be served by any method which is:

- 59 (1) permitted by the law of the country in which it is to be served²;
- 60 (2) provided for by the rule relating to service through foreign governments, judicial authorities and British consular authorities³, or by the rule relating to service in accordance with the Service Regulation⁴ or by the rule⁵ relating to service on a state⁶; or
- 61 (3) permitted by a civil procedure convention⁷.

Nothing in the provisions described above or in any court order authorises or requires any person to do anything in the country where the claim form is to be served which is against the law of that country⁸.

1 As to the general rules for service of a claim form within the jurisdiction, which apply equally to service out of the jurisdiction, subject to any enactment, rule or practice direction that provides otherwise, see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq. As to service out of the jurisdiction generally see CIVIL PROCEDURE vol 11 (2009) PARA 156 et seq.

2 CPR 6.24(1)(a).

3 Ie provided for by CPR 6.25: see para 121 post.

4 Ie provided for by CPR 6.26A: see para 122 post. 'The Service Regulation' means EC Council Regulation 1348/2000 (OJ L160, 30.06.2000, p 37) on the service in the member states of judicial and extrajudicial documents in civil or commercial matters: CPR 6.18(ea). See CIVIL PROCEDURE vol 11 (2009) PARA 157 et seq. As to the provisions governing the service of documents in accordance with the Service Regulation see para 122 post.

5 Ie provided for by CPR 6.27: see para 123 post.

6 CPR 6.24(1)(b).

7 CPR 6.24(1)(c). For these purposes, 'civil procedure convention' means the Brussels and Lugano Conventions and any other convention entered into by the United Kingdom regarding service outside the jurisdiction (eg the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague, 15 November 1965; TS 50 (1969); Cmnd 3986)); CPR 6.18(e). As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. For the meaning of 'United Kingdom' see para 4 ante.

8 CPR 6.24(2).

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

120 Mode of service out of the jurisdiction: general

NOTE 4--From 13 November 2008, Regulation 1348/2000 repealed and replaced by European Parliament and EC Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (service of documents).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/121. Procedure for service through foreign governments, judicial authorities and British consular authorities.

121. Procedure for service through foreign governments, judicial authorities and British consular authorities.

Except where service is to be effected in accordance with the Service Regulation¹, the general rule as to mode of service is displaced in the case of particular countries as follows:

- 62 (1) if the claim form is to be served² on a defendant in any country which is a party to the Hague Convention³, it may be served either:
 - 5 9. (a) through the authority designated under the Convention in respect of that country⁴; or
 10. (b) if the law of that country permits, through the judicial authority of that country⁵ or through a British consular authority there⁶;
- 6 63 (2) if the claim form is to be served⁷ on a defendant in any country which is a party to a civil procedure convention⁸ (other than the Hague Convention) providing for service there, it may be served, if the law of that country permits, either:
 - 7 11. (a) through the judicial authorities of that country⁹; or
 12. (b) through a British consular authority there¹⁰;
- 8 64 (3) if the claim form is to be served¹¹ on a defendant in any country with respect to which there is no civil procedure convention providing for service there, it may be served either:
 - 9 13. (a) through the government of that country, if it is willing to effect service¹²; or
 14. (b) through a British consular authority there¹³;
- 10 65 (4) if the claim form is to be served in Scotland, Northern Ireland, the Isle of Man or the Channel Islands, any Commonwealth state, or any United Kingdom overseas territory or any associated state, then, unless the country concerned is a party to the Hague Convention¹⁴, service must be effected in the ordinary way¹⁵.

A person wishing to serve a claim form under head (1), (2) or (3) above must file a request for service of the claim form¹⁶ together with a copy of the claim form¹⁷, any translation that might be required¹⁸, and any other documents, copies of documents or translations required¹⁹. The court officer must then seal the copy of the claim form and forward the documents to the Senior Master²⁰, who must send the documents to the authority designated under the Hague Convention (where the claim form is being served through that authority)²¹ or (in any other case) to the Foreign and Commonwealth Office with a request that it arranges for the claim to be served by the method indicated in the claimant's request for service or, where alternative methods are thereby indicated, by the most convenient method²².

An official certificate²³ which states that a claim form, as regards which these provisions have been complied with, has been served on a person personally or in accordance with the law of the country of service, and which specifies the date on which the claim form was served, is evidence of the facts so stated²⁴.

1 CPR 6.25(5). Where service is to be effected in the European Union, the Service Regulation prevails over all other arrangements made to the same effect by the member states: see para 122 post. For the meaning of 'the Service Regulation' see para 120 note 4 ante.

2 Ie in accordance with CPR 6.25, CPR 6.26.

3 'The Hague Convention' means the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague, 15 November 1965; TS 50 (1969); Cmnd 3986): CPR 6.18(b). The Convention does not invalidate any bilateral civil procedure convention already in force and does not prevail over the provisions of the Service Regulation (as to which see para 122 post).

4 CPR 6.25(1)(a).

5 CPR 6.25(1)(b)(i).

6 CPR 6.25(1)(b)(ii).

7 Ie in accordance with CPR 6.25, CPR 6.26.

8 For the meaning of 'civil procedure convention' see para 120 note 7 ante.

9 CPR 6.25(2)(a).

10 CPR 6.25(2)(b). This is subject to any provision of the applicable convention as to the nationality of persons who may be served by such a method: CPR 6.25(2)(b).

11 Ie in accordance with CPR 6.25, CPR 6.26.

12 CPR 6.25(3)(a).

13 CPR 6.25(3)(b).

14 Ie unless the service is to be effected pursuant to CPR 6.25(1): see head (1) in the text.

15 See CPR 6.25(4), which excludes service in those places from the operation of CPR 6.25.

16 CPR 6.26(2)(a). Every request for service filed under this provision must contain an undertaking by the person making the request to be responsible for all expenses incurred by the Foreign and Commonwealth Office or foreign judicial authority, and to pay those expenses to the Foreign and Commonwealth Office or foreign judicial authority on being informed of the amount: CPR 6.29.

17 CPR 6.26(2)(b).

18 CPR 6.26(2)(c). The claimant is not required to file a translation of a claim form filed under this provision where the claim form is to be served in a country of which English is an official language or served on a holder of British nationality, unless service is to be under a civil procedure convention which expressly requires a translation: CPR 6.28(4).

Where a translation is required, every copy of the claim form filed under this provision (and also under CPR 6.27: see para 123 post) must be accompanied by a translation of the claim form: CPR 6.28(1). See also *Practice Direction--Service out of the Jurisdiction* (2001) PD6B paras 4.1, 4.2. Furthermore, the translation must be in the official language of the country in which it is to be served, or (if there is more than one official language of that country) in any official language which is appropriate to the place in the country where the claim form is to be served: CPR 6.28(2). The translation must be certified as correct by the translator, who must state his name, address and qualifications for making the translation: CPR 6.28(3).

19 CPR 6.26(2)(d). Copies of other documents may be required by the relevant practice direction: CPR 6.26(2)(d). See *Practice Direction--Service out of the Jurisdiction* (2001) PD6B paras 2.1, 2.2.

20 CPR 6.26(3).

21 CPR 6.26(4)(a).

22 CPR 6.26(4)(b). As to the Foreign and Commonwealth Office see CONSTITUTIONAL LAW AND HUMAN RIGHTS VOL 8(2) (Reissue) para 466 et seq.

23 The certificate must be made by a British consular authority in the country of service, by the government or judicial authorities of that country or by any other authority designated in respect of that country under the Hague Convention (see note 3 *supra*): CPR 6.26(5)(c)(i)-(iii).

24 CPR 6.26(5). A document purporting to be such a certificate is deemed to be such a certificate until the contrary is proved: CPR 6.26(6).

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/122. Service in accordance with the Service Regulation.

122. Service in accordance with the Service Regulation.

Where a claim form is to be served in accordance with the Service Regulation¹, the claimant must file the claim form and any translations or other documents required by it². When the claimant files such documents, the court officer will seal a copy of the claim form and forward the documents to the Senior Master³. The rules as to proof of service⁴ do not apply⁵.

- 1 CPR 6.26A(1). For the meaning of 'the Service Regulation' see para 120 note 4 ante.
- 2 CPR 6.26A(2). See CIVIL PROCEDURE vol 11 (2009) PARA 157 et seq.
- 3 CPR 6.26A(3).
- 4 Ie the provisions of CPR 6.31; and see CIVIL PROCEDURE vol 11 (2009) PARA 180.
- 5 CPR 6.26A(4).

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/123. Mode of service on foreign or Commonwealth state where court permits service out of the jurisdiction.

123. Mode of service on foreign or Commonwealth state where court permits service out of the jurisdiction.

Where a person to whom permission has been given¹ to serve a claim form on a state² wishes to have the claim form served on that state³, he must file in the Central Office of the Royal Courts of Justice a request for service to be arranged by the Foreign and Commonwealth Office⁴, a copy of the claim form⁵, and any translation of the claim form in the official language of the state that may be required⁶. The documents so filed must be sent by the Senior Master to the Foreign and Commonwealth Office with a request that it arranges for the claim form to be served⁷.

Where the State Immunity Act 1978 applies⁸ and the state has agreed to a method of service other than through the Foreign and Commonwealth Office, the claim may be served either by the method agreed or as provided above⁹.

An official certificate by the Foreign and Commonwealth Office stating that a claim form has been duly served on a specified date in accordance with a request made under this rule is evidence of that fact¹⁰.

1 Ie under CPR 6.20: see para 99 et seq ante.

2 Ie a state as defined in the State Immunity Act 1978 s 14: see CPR 6.27(7); and CIVIL PROCEDURE vol 11 (2009) PARA 177.

3 CPR 6.27(1). As to undertakings regarding expenses see CPR 6.29; and para 121 note 16 ante.

4 CPR 6.27(2)(a). As to the Foreign and Commonwealth Office see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 466 et seq.

5 CPR 6.27(2)(b).

6 CPR 6.27(2)(c). The requirements for translated documents (if any) are specified in CPR 6.28: see para 121 note 18 ante.

7 CPR 6.27(3).

8 Ie the State Immunity Act 1978 s 12(6), which provides that the method for serving documents on a state prescribed by s 12(1) does not prevent the service of a claim form or other document in a manner to which the state has agreed: see CIVIL PROCEDURE vol 11 (2009) PARA 177.

9 CPR 6.27(6).

10 CPR 6.27(4). A document purporting to be such a certificate is deemed to be such a certificate until the contrary is proved: CPR 6.27(5).

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(3) JURISDICTION UNDER THE COMMON LAW AND OTHER RULES/124. Service of foreign process in England.

124. Service of foreign process in England.

Except where the Service Regulation applies¹, service within England² of foreign process³ may be effected where the Senior Master receives a written request for service either:

- 66 (1) from the Secretary of State for Foreign and Commonwealth Affairs with a recommendation by him that such service should be effected⁴; or
- 67 (2) where the foreign court or tribunal is in a convention country⁵, from a consular or other authority of that country⁶.

The request must be accompanied by a translation of it into English⁷, two copies of the process⁸ and, unless the foreign court or tribunal certifies that the person to be served understands the language of the process, two copies of a translation of the process⁹. The method of service is as directed by the Senior Master¹⁰.

The process server¹¹ must send to the Senior Master a copy of the process, proof of service (or a statement why the process could not be served, as the case may be)¹², and, if the Senior Master so directs, the process server must specify the costs incurred in serving or attempting to serve the process¹³. The Senior Master must send to the person who requested service¹⁴ a certificate¹⁵, together with a copy of the process¹⁶, stating: (a) when and how the process was served or the reason why it could not be served¹⁷; and (b) where appropriate, the amount certified by a costs judge to be the costs of effecting or attempting to effect service¹⁸.

1 CPR 6.32(1)(b). As to the Service Regulation see para 122 ante.

2 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 Ie any court process in connection with civil or commercial proceedings in a foreign court or tribunal: CPR 6.32(1)(a).

4 CPR 6.33(a)(ii). As to the Secretary of State for Foreign and Commonwealth Affairs see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 459.

5 CPR 6.33(a)(i). 'Convention country' means a foreign country in relation to which there is a civil procedure convention providing for service in that country of process of the High Court, and includes a country which is a party to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague, 15 November 1965; TS 50 (1969); Cmnd 3986): CPR 6.32(2)(a).

6 CPR 6.33(a)(i).

7 CPR 6.33(b).

8 CPR 6.33(c).

9 CPR 6.33(d).

10 CPR 6.34.

11 'Process server' means either a process server appointed by the Lord Chancellor to serve documents to which these provisions (CPR 6.32-6.35) apply, or his authorised agent: CPR 6.32(2)(b). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

12 CPR 6.35(1)(a).

13 CPR6.35(1)(b).

14 le the consular or other authority or the Secretary of State, as the case may be.

15 The certificate must be sealed with the seal of the Supreme Court for use out of the jurisdiction: CPR 6.35(2)(a).

16 CPR 6.35(2)(b).

17 CPR 6.35(2)(a)(i).

UPDATE

UPDATE

95-124 Jurisdiction under the Common Law and other Rules

CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(4) PARTICULAR INTERNATIONAL CONVENTIONS AFFECTING JURISDICTION AND THE RECOGNITION OF JUDGMENTS/125. International conventions affecting jurisdiction.

(4) PARTICULAR INTERNATIONAL CONVENTIONS AFFECTING JURISDICTION AND THE RECOGNITION OF JUDGMENTS

125. International conventions affecting jurisdiction.

The jurisdiction of the English¹ court is sometimes excluded or limited by a statute implementing an international convention. If the convention in question contains particular provisions for the taking of jurisdiction, neither the 'Brussels I' Regulation nor the Brussels Convention nor the Lugano Convention² prejudices the right of the claimant to take advantage of these particular Convention rules on jurisdiction³. Where the court has jurisdiction by reason of an enactment giving effect in English law to some other convention, service of the claim form out of the jurisdiction will be available as of right⁴. The 'Brussels I' Regulation and the Brussels and Lugano Conventions do not prevent a court of a Regulation state or contracting state⁵ from assuming jurisdiction in accordance with some other convention, even where the defendant is domiciled in another Regulation state or another Brussels or Lugano contracting state which is not a party to the other Convention⁶.

An action for damages against a carrier by air arising out of international carriage⁷ must be brought at the option of the claimant in the territory of one of the high contracting parties to the Warsaw Convention⁸, either before the court having jurisdiction where the carrier⁹ is ordinarily resident¹⁰ or has his principal place of business or has an establishment by which the contract of carriage was made, or before the court having jurisdiction at the place of destination of the flight¹¹.

Any legal proceedings arising out of the international carriage of goods by road may be brought only in the courts or tribunals of a contracting country¹² designated by agreement between the parties, or in the courts or tribunals of a country within whose territory:

- 68 (1) the defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made is situated; or
- 69 (2) the place where the goods were taken over by the carrier or the place designated for delivery is situated¹³.

As from a day to be appointed, legal proceedings arising out of the international carriage of passengers and their luggage by road may be brought in any court or tribunal designated by agreement between the parties, or in the country within whose territory there is situated:

- 70 (a) the place where the defendant has his principal place of business, is habitually resident, or has the place of business through which the contract of carriage was made; or
- 71 (b) the place where the loss or damage occurred; or
- 72 (c) the place of departure or destination of the carriage,

and in no other court¹⁴.

Disputes arising out of membership of a liner conference must be settled by the prescribed conciliation procedure, and proceedings for remedies under national law must be stayed by the national courts in favour of the conciliation procedure¹⁵.

Further conventions apply to:

- 73 (i) claims arising out of the international carriage of passengers by sea¹⁶ and the international carriage of passengers and their luggage, and goods, by rail¹⁷;
- 74 (ii) claims for the recovery of air navigation charges¹⁸;
- 75 (iii) collisions at sea¹⁹;
- 76 (iv) oil pollution by ships²⁰; and
- 77 (v) proceedings relating to the remuneration of officers or crew of ships or aircraft²¹.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

3 'Brussels I' Regulation art 71 para 1; Brussels Convention art 57 para 1; Lugano Convention art 57 para 1. But the provisions of the Regulation and of those Conventions as to *lis alibi pendens* (see para 128 post) may still operate to prevent the exercise of such jurisdiction if the other Convention contains no similar provision: Case C-406/92 *The Tatry (cargo owners) v The Maciej Rataj (owners)* [1994] ECR I-5439, [1995] All ER (EC) 229, ECJ.

4 CPR 6.19(2). See para 119 ante.

5 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

6 'Brussels I' Regulation art 71 para 2(a); Brussels Convention art 57 para 2(a); Lugano Convention art 57 para 2. These provisions also require the court to apply art 26 of the Regulation or art 20 of the Brussels or Lugano Convention (as the case may be): see para 127 post. See also note 3 supra.

7 As to the meaning of 'international carriage' see CARRIAGE AND CARRIERS vol 7 (2008) PARA 125.

8 As to the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw, 12 October 1929; TS 11 (1933); Cmd 4284) (as amended by the Hague Protocol and the Montreal Additional Protocol 4) ('the Warsaw Convention') see AIR LAW vol 2 (2008) PARA 8. For a list of the parties to the Warsaw Convention see the Carriage by Air (Parties to Convention) Order 1999, SI 1999/1313.

9 This includes not only the 'contracting carrier' who made the contract of carriage but also the 'actual carrier' to whom part or all of the carriage was sub-contracted by the contracting carrier: Carriage by Air (Supplementary Provisions) Act 1962 s 1(1), Schedule arts I, VII, VIII, implementing the Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier (Guadalajara, 18 September 1961; TS 23 (1964); Cmd 2354). See CARRIAGE AND CARRIERS vol 7 (2008) PARA 131.

10 For the meaning of 'ordinarily resident' see para 58 ante.

11 See the Carriage by Air Act 1961 s 1(1), Sch 1 art 28(1). The Carriage by Air Act 1961 gives effect to the provisions of the Warsaw Convention (see note 8 supra): see AIR LAW vol 2 (2008) PARA 8.

12 For a list of the parties to the Convention see the Carriage of Goods by Road (Parties to Convention) Order 1967, SI 1967/1683 (amended by SI 1980/697).

13 See the Carriage of Goods by Road Act 1965 s 1, Schedule art 31 para 1. This Act implements the Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956; TS 90 (1967); Cmd 3455). See CARRIAGE AND CARRIERS vol 7 (2008) PARA 650 et seq. See also *Andrea Merzario Ltd v Internationale Spedition Leitner Gesellschaft GmbH* [2001] EWCA Civ 61, [2001] 1 All ER (Comm) 883, [2001] 1 Lloyd's Rep 490 (under the CMR art 31 para 1, proceedings became pending at point of service).

14 See the Carriage of Passengers by Road Act 1974 s 1(1), Schedule art 21 para 1, prospectively implementing the Convention on the Contract for the International Carriage of Passengers and Luggage by

Road (Geneva, 1 March 1973; Misc 17 (1974); Cmnd 5622). At the date at which this volume states the law, the provisions of the Carriage of Passengers by Road Act 1974 giving effect to the Convention have not been brought into force: see s 14(5); and CARRIAGE AND CARRIERS vol 7 (2008) PARA 657.

15 See the Merchant Shipping (Liner Conferences) Act 1982 s 1(2), Schedule para 25. The 1982 Act implements the Convention on a Code of Conduct for Liner Conferences (Geneva, 6 April 1974).

16 See the Merchant Shipping Act 1995 s 183(1), which gives effect to the Convention relating to the Carriage of Passengers and their Luggage by Sea (Athens, 13 December 1974; Misc 27 (1975); Cmnd 6326). The Convention is set out in the Merchant Shipping Act 1995 Sch 6: see CARRIAGE AND CARRIERS vol 7 (2008) PARA 634 et seq. See also the Carriage of Passengers and their Luggage by Sea (Interim Provisions) Order 1980, SI 1980/1092 (amended by SI 1987/670).

17 See the International Transport Conventions Act 1983 s 1 (as amended), which gives effect to the Convention concerning International Carriage by Rail (Berne, 9 May 1980; Misc 11 (1982); Cmnd 8535). See CARRIAGE AND CARRIERS vol 7 (2008) PARA 683 et seq.

18 See the Civil Aviation Act 1982 s 24, Sch 4 (as amended), implementing the Eurocontrol Convention (ie the International Convention relating to Co-operation for the Safety of Air Navigation (Eurocontrol) (Brussels, 13 December 1960; TS 39 (1963); Cmnd 2114)). See AIR LAW vol 2 (2008) PARA 23.

19 See the Supreme Court Act 1981 s 22, which is based on the International Convention for the Unification of Certain Rules Concerning Civil Jurisdiction in matters of Collision (Brussels, 10 May 1952; TS 47 (1960); Cmnd 1128). See SHIPPING AND MARITIME LAW vol 93 (2008) PARA 85 et seq.

20 See the Merchant Shipping Act 1995 (particularly s 166, giving effect to the International Convention on Civil Liability for Oil Pollution Damage 1992). See ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 45 (2010) PARA 456.

21 See the Consular Relations Act 1968 s 4, and Orders in Council made thereunder, giving effect to a number of international agreements entered into by the United Kingdom. See INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 303.

UPDATE

125 International conventions affecting jurisdiction

NOTE 4--CPR Pt 6 substituted: SI 2008/2178.

NOTE 6--Under the Brussels Convention art 57 para 2(a), the court of a contracting state in which a defendant domiciled in another contracting state is sued may derive its jurisdiction from a specialised convention even where the defendant submits no pleas on the merits in the course of the proceedings: *Case C-148/03 Nürnberger Allgemeine Versicherungs AG v Portbridge Transport International BV* [2006] 1 All ER (Comm) 896, ECJ.

The 'Brussels I' Regulation Convention do not prevent a court of a contracting state from assuming jurisdiction in accordance with some other convention, even where the defendant is domiciled in another Brussels contracting state which is not a party to the other Convention.

NOTE 14--1974 Act repealed: Statute Law (Repeals) Act 2004.

NOTE 19--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(4) PARTICULAR INTERNATIONAL CONVENTIONS AFFECTING JURISDICTION AND THE RECOGNITION OF JUDGMENTS/126. International conventions denying jurisdiction by certificate.

126. International conventions denying jurisdiction by certificate.

No court in England has jurisdiction to determine any claim or question certified under statutory powers by the Secretary of State to be a claim or question which under an international convention falls to be determined by the court of a foreign country¹.

¹ See eg the Supreme Court Act 1981 s 23 in relation to the Rhine Navigation Convention; and SHIPPING AND MARITIME LAW vol 93 (2008) PARA 86. See also the Nuclear Installations Act 1965 s 17(1); and FUEL AND ENERGY vol 19(3) (2007 Reissue) para 1507. In any enactment, 'Secretary of State' means one of Her Majesty's principal Secretaries of State: see the Interpretation Act 1978 s 5, Sch 1. The office of Secretary of State is a unified office, and in law each Secretary of State is capable of performing the functions of all or any of them: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 355. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

UPDATE

126 International conventions denying jurisdiction by certificate

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(5) STAY OF PROCEEDINGS/(i) Stay of Proceedings under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/A. REMOVAL OF JURISDICTION/127. Examination of jurisdiction.

(5) STAY OF PROCEEDINGS

(i) Stay of Proceedings under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

A. REMOVAL OF JURISDICTION

127. Examination of jurisdiction.

Where a defendant domiciled in one Regulation state or contracting state¹ is sued in the courts of another Regulation state or contracting state (as the case may be) and does not enter an appearance, the court must declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the 'Brussels I' Regulation or from the Brussels or Lugano Convention (as the case may be)². Similarly, where a defendant domiciled in one part of the United Kingdom³ is sued in the courts of another part of the United Kingdom and does not enter an appearance, the court must declare of its own motion that it has no jurisdiction unless it is derived from the scheme for determining jurisdiction between parts of the United Kingdom⁴. In either case, the court must stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end⁵.

¹ For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

² 'Brussels I' Regulation art 26 para 1; Brussels Convention art 20, 1st para; Lugano Convention art 20, 1st para. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

³ For the meaning of 'United Kingdom' see para 4 ante; and for the meaning of 'part of the United Kingdom' see para 66 note 3 ante. As to the adaptation of the provisions of the Conventions by the Civil Jurisdiction and Judgments Act 1982 s 16 (as amended), Sch 4 (as substituted) to a scheme applying as between parts of the United Kingdom see para 66 ante. As to the interpretation of the scheme by reference to decisions under the Brussels Convention or the 'Brussels I' Regulation see para 70 ante.

⁴ Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 15(1) (Sch 4 substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt I para 4).

⁵ 'Brussels I' Regulation art 26 para 2; Brussels Convention art 20, 2nd para; Lugano Convention art 20, 2nd para. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 15(2) (Sch 4 as substituted: see note 4 supra).

Where the document instituting the proceedings or an equivalent document has to be transmitted from one Regulation state to another pursuant to the Service Regulation, art 19 of that Regulation displaces the provisions of the 'Brussels I' Regulation art 26 para 2: art 26 para 3. Where the Service Regulation does not apply and a Regulation state or contracting state is bound to serve judicial and extra-judicial documents in accordance with its international obligations see the 'Brussels I' Regulation art 26 para 4; the Brussels Convention art 20, 3rd para, Annexed Protocol art IV; and the Lugano Convention art 20, 3rd para, Protocol No I art IV. For the meaning of 'the Service Regulation' see para 120 note 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(5) STAY OF PROCEEDINGS/(i) Stay of Proceedings under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/A. REMOVAL OF JURISDICTION/128. *Lis alibi pendens*.

128. *Lis alibi pendens*.

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Regulation states or contracting states¹, any court other than the court first seised must of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established². Where the jurisdiction of the court first seised is established, any other court must decline jurisdiction in favour of that court³. A court seised second is not permitted to continue to hear the case on the ground that it considers that the court first seised does not have, or should not be exercising, jurisdiction⁴.

This provision is given a broad and flexible interpretation in order to prevent irreconcilable judgments⁵. Proceedings involve the same cause of action where they advance claims which might give rise to irreconcilable judgments, even if they appear to involve separate aspects of a single transaction; the two claims do not have to be identical. Thus an action for damages for breach of contract may involve the same cause of action as one for rescission of the same contract⁶. Proceedings are between the same parties if there is a common claimant and a common defendant, even if there are other parties additionally involved, but the obligation to decline jurisdiction extends only to the parties which are common to both sets of proceedings⁷. Proceedings do not cease to be between the same parties or arise from the same cause of action merely because the proceedings in one state are in the form of an admiralty action in rem and those in the other take the form of an action in personam⁸.

Under the 'Brussels I' Regulation, a court is deemed to be seised:

- 78 (1) at the time when the document instituting the proceedings or an equivalent document is lodged with the court⁹; or
- 79 (2) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service¹⁰.

Under the Brussels and Lugano Conventions, the date at which a court is seised must be determined by the national law of the court seised, by ascertaining when proceedings became definitively pending between the parties¹¹. As far as English law is concerned, this date is, for the purpose of the Conventions, the date of service (as distinct from the issue) of the claim form¹². This remains so even if the court has already made orders in the litigation prior to the service of the claim form in the substantive proceedings¹³.

A court may stay proceedings where related actions are brought in the courts of other states, or may decline jurisdiction to enable the consolidation of related actions¹⁴.

1 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

It has been held that art 27 of the 'Brussels I' Regulation, and art 21 of the Brussels and Lugano Conventions (see note 2 infra) apply also as between the courts of England and Scotland; and that the common law principle of *forum non conveniens* (as to which see para 131 post) does not: *Foxen v Scotsman Publications Ltd* [1995] EMLR 145 (not followed in *Cumming v Scottish Daily Record and Sunday Mail Ltd* [1995] EMLR 538). However, the Civil Jurisdiction and Judgments Act 1982 Sch 4 (as substituted) (see para 66 ante) does not contain provisions analogous to those of the 'Brussels I' Regulation or the Conventions, and therefore the latter decision is to be preferred. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. As to references to numbered

articles of the Conventions see para 65 note 8 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 'Brussels I' Regulation art 27 para 1; Brussels Convention art 21, 1st para; Lugano Convention art 21, 1st para. These provisions provide a mechanism to ensure that parallel litigation does not occur where the effect of the rules (see paras 75-93 ante) would be to confer jurisdiction upon the courts of two or more states: see eg para 79 note 3 ante. However, they do not apply where the proceedings in the first court seised have been properly discontinued: *Internationale Nederlanden Aviation Lease BV v Civil Aviation Authority* [1997] 1 Lloyd's Rep 80.

Separate actions are between the same parties for these purposes if it is established that the interests of those parties are identical and indissociable: Case C-351/96 *Drouot Assurances SA v Consolidated Metallurgical Industries (CMI Industrial Sites)* [1999] QB 497, [1998] ECR I-3075, ECJ. See also *The Happy Fellow* [1998] 1 Lloyd's Rep 13, CA. As to the approach of the court when considering which of the courts in question has been first seised for the purposes of the Brussels Convention see *Phillips v Symes* [2002] 1 WLR 853.

3 'Brussels I' Regulation art 27 para 2; Brussels Convention art 21, 2nd para; Lugano Convention art 21, 2nd para.

4 Case C-351/89 *Overseas Union Insurance Ltd v New Hampshire Insurance Co* [1991] ECR I-3317, ECJ. The European Court in that case did not decide the question whether a court seised second may proceed to hear the case if it has exclusive jurisdiction under the Conventions. Contrast, however, *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 2 All ER 540, [1994] 1 WLR 588, CA, where a choice of court agreement validly gave exclusive jurisdiction to the English courts under art 17 of the Conventions; it was held that art 17 took precedence over arts 21, 22, so that the English court had jurisdiction notwithstanding that proceedings had already been begun in the Greek courts. See also *Lexmar Corpn and Steamship Mutual Underwriting Association (Bermuda) Ltd v Nordisk Skibsrederforening and Northern Tankers (Cyprus) Ltd* [1997] 1 Lloyd's Rep 289; *OT Africa Line Ltd v Hijazy, The Kribi* [2001] 1 Lloyd's Rep 76; and para 79 ante. As to references to numbered articles of the Conventions see para 65 note 8 ante.

As to jurisdiction where proceedings have been instituted in two contracting states before the entry into force of the Brussels Convention in both states see Case C-163/95 *von Horn v Cinnamon* [1998] QB 214, ECJ.

5 See Case 144/86 *Gubisch Maschinenfabrik KG v Palumbo* [1987] ECR 4861, ECJ; Case C-351/89 *Overseas Union Insurance Ltd v New Hampshire Insurance Co* [1991] ECR I-3317, ECJ. See also *Mecklermedia Corpn v DC Congress GmbH* [1998] Ch 40, [1998] 1 All ER 148 (where the outcome of foreign proceedings could not affect English proceedings, and where the English cause of action was not actionable in the foreign jurisdiction, there was no risk of irreconcilable judgments, and discretion to stay the English proceedings would not be exercised); *Glencore International AG v Metro Trading International Inc (Banque Trad-Crédit Lyonnais (France) SA, third party); Metro Trading International Inc v Itochu Petroleum Co (S) Pte Ltd (Banque Trad-Crédit Lyonnais (France) SA, third party)* [1999] 2 All ER (Comm) 899 (complicated set of proceedings arising out of the same collapsed business shared the purpose of determining the rights and obligations of the parties involved and did involve the same cause of action).

The European Court has acknowledged that there is relationship between the doctrine of res judicata and the Brussels Convention art 21: Case C-351/96 *Drouot Assurances SA v Consolidated Metallurgical Industries (CMI Industrial Sites)* [1999] QB 497, ECJ [1998] ECR I-3075, ECJ. See also para 191 note 7 post.

6 Case 144/86 *Gubisch Maschinenfabrik KG v Palumbo* [1987] ECR 4861, ECJ. Similarly proceedings for a declaration of non-liability involve the same cause of action as proceedings to enforce the liability which is denied: Case C-406/92 *The Tatry (cargo owners) v The Maciej Rataj (owners)* [1994] ECR I-5439, [1995] All ER (EC) 229, ECJ. Compare *Glencore International AG v Shell International Trading and Shipping Co Ltd* [1999] 2 All ER (Comm) 922 (an application for interpleader relief is not the same cause of action as proceedings relating to liability); *Haji-Ioannou v Frangos* [1999] 2 All ER (Comm) 865, [1999] 2 Lloyd's Rep 337, CA (a claim for the tracing of money into assets does not have the same 'objet' (see French language version of art 21 of the Conventions) as a claim for the simple recovery of money); *The Winter* [2000] 2 Lloyd's Rep 298 (provisional measures sought in one Regulation state do not share the same cause of action as substantive proceedings commenced subsequently in another). As to provisional measures available under the 'Brussels I' Regulation see para 136 post.

7 Case C-406/92 *The Tatry (cargo owners) v The Maciej Rataj (owners)* [1994] ECR I-5439, [1995] All ER (EC) 229, ECJ; *Frans Maas Logistics (UK) Ltd v CDR Trucking BV* [1999] 1 All ER (Comm) 737, [1999] 2 Lloyd's Rep 179. See also *Grupo Torras SA v Sheikh Fahad Mohammed Al-Sabah* [1996] 1 Lloyd's Rep 7, CA; *Glencore International AG v Shell International Trading and Shipping Co Ltd* [1999] 2 All ER (Comm) 922. It was pointed out by the European Court in Case C-406/92 *The Tatry (cargo owners) v The Maciej Rataj (owners)* supra that under art 22 of the Conventions (see para 129 post), it is open to the court in its discretion to stay proceedings or decline jurisdiction in order to avoid fragmenting the proceedings.

8 Case C-406/92 *The Tatry (cargo owners) v The Maciej Rataj (owners)* [1994] ECR I-5439, [1995] All ER (EC) 229, ECJ; *The Anna H* [1995] 1 Lloyd's Rep 11, CA. It would in any event presumably be open to the court in its discretion to stay the proceedings or decline jurisdiction under art 22 of the Conventions on the ground that the proceedings were related: see para 129 post.

9 'Brussels I' Regulation art 30 para 1. This is subject to the proviso that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant: art 30 para 1. English proceedings are started when the court issues a claim form at the request of the claimant: CPR 7.1. A claim form is issued on the date entered on the form by the court: CPR 7.2. See also CIVIL PROCEDURE vol 11 (2009) PARA 118.

10 'Brussels I' Regulation art 30 para 2. This is subject to the proviso that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court: art 30 para 2.

11 Case 129/83 *Zelger v Salinitri (No 2)* [1984] ECR 2397, [1985] 3 CMLR 366, ECJ. See also *Molins plc v GD SpA* [2000] 1 WLR 1741, CA; *Andrea Merzario Ltd v Internationale Spedition Leitner Gesellschaft GmbH* [2001] EWCA Civ 61, [2001] 1 All ER (Comm) 883, [2001] 1 Lloyd's Rep 490 (proceedings brought in Vienna for a declaration of non-liability commenced before, but served after, indemnity proceedings in England had been served, became pending at point of service).

12 *Dresser (UK) Ltd v Falcongate Freight Management Ltd* [1992] QB 502, [1992] 2 All ER 450, CA.

13 *Neste Chemicals SA v DK Line SA, The Sargasso* [1994] 3 All ER 180, [1994] 2 Lloyd's Rep 6, CA, disapproving dicta to the contrary in *Dresser (UK) Ltd v Falcongate Freight Management Ltd* [1992] QB 502, [1992] 2 All ER 450, CA.

14 See the Brussels Convention art 22; the Lugano Convention art 22; and para 129 post. As to the meaning of 'related actions' see Case C-406/92 *the Tatry (cargo owners) v The Maciej Rataj (owners)* [1994] ECR I-5439, [1995] All ER (EC) 229, ECJ.

UPDATE

128 Lis alibi pendens

NOTE 2--As to the approach of the court when considering which of the courts in question has been first seised for the purposes of the Brussels Convention see also *Tavoulareas v Tsavlis* [2004] EWCA Civ 48, [2004] 2 All ER (Comm) 221. See also *Speed Investments Ltd v Formula One Holdings Ltd (No 2)* [2004] EWCA Civ 1512, [2005] 1 WLR 1936; *WPP Holdings Italy SRL v Benatti* [2007] EWCA Civ 263, [2007] 2 All ER (Comm) 525.

See also *Kolden Holdings Ltd v Rodette Commerce Ltd* [2008] EWCA Civ 10, [2008] Bus LR 1051 (interests of assignee and assignor of legal action were identical and indissociable, and so they were the 'same parties' within the meaning of the Brussels Convention art 27); *Underwriting Members of Lloyd's Syndicate 980 v Sinco SA* [2008] EWHC 1842 (Comm), [2009] 1 All ER (Comm) 272.

NOTE 6--See also *JP Morgan v Primacom* [2005] EWHC 508 (Comm), [2005] 2 All ER (Comm) 764.

NOTE 7--See also *Konkola Copper Mines plc v Coromin Ltd* [2006] EWHC 1093 (Comm), [2006] 2 All ER (Comm) 400.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(5) STAY OF PROCEEDINGS/(i) Stay of Proceedings under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/B. DISCRETIONARY STAY OF PROCEEDINGS/129. Discretionary stay of proceedings.

B. DISCRETIONARY STAY OF PROCEEDINGS

129. Discretionary stay of proceedings.

The 'Brussels I' Regulation and Brussels and Lugano Conventions confer a power, exercisable on limited and narrowly defined grounds, to stay proceedings in favour of the courts of another Regulation state or contracting state¹. Where related actions are pending in the courts of another Regulation state or contracting state, any court other than the court first seised is permitted to stay its proceedings². It is probable that, when the court seised first has reached its decision, the other court will lift the stay and proceed with its hearing³.

The Conventions also confer a limited power on the court to dismiss the proceedings if:

- 80 (1) the two actions pending at first instance are related; and
- 81 (2) the court first seised has jurisdiction over both actions; and
- 82 (3) its law permits the actions to be consolidated⁴.

1 As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

2 'Brussels I' Regulation art 28 para 1; Brussels Convention art 22, 1st para; Lugano Convention art 22, 1st para. For these purposes, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings: 'Brussels I' Regulation art 28 para 3; Brussels Convention art 22, 3rd para; Lugano Convention art 22, 3rd para.

See further *Sarrio SA v Kuwait Investment Authority* [1999] 1 AC 32, [1997] 4 All ER 929, [1998] Lloyd's Rep 129, HL (whether actions are related for these purposes ought to be decided using a broad, common sense approach which bears in mind the objective of the Brussels Convention art 22 and avoids over-sophisticated analysis); *Internationale Nederlanden Aviation Lease BV v Civil Aviation Authority* [1997] 1 Lloyd's Rep 80 (where proceedings in England had not formally been discontinued before the claimant commenced a related action in Belgium, it would be contrary to the policy of the Brussels Convention for the court first seised to permit those proceedings to be discontinued in order to allow the claimant to commence a new action in a different contracting state); *Molins plc v GD SpA* [2000] 1 WLR 1741, CA (a court, by validating irregular service retrospectively, cannot achieve siesin of proceedings retrospectively). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 This remedy is discretionary, but in the interests of judicial efficiency, and to reduce the risk of irreconcilable judgments, the court seised second should incline towards granting one or the other species of relief: Case C-406/92 *The Tatry (cargo owners) v The Maciej Rataj (owners)* [1994] ECR I-5439, [1995] All ER (EC) 229, ECJ. See also *The Linda* [1988] 1 Lloyd's Rep 175; *The Nordglimt* [1988] QB 183, [1988] 2 All ER 531; *The Maciej Rataj* [1992] 2 Lloyd's Rep 552, CA. Article 22 of the Conventions applies to cases where the court seised second does have jurisdiction to hear the case brought before it (as distinct from the case where the court seised second has no jurisdiction at all by reason of art 21: see para 128 ante).

4 'Brussels I' Regulation art 28 para 2; Brussels Convention art 22, 2nd and 3rd paras; Lugano Convention art 22, 2nd and 3rd paras. As to the use of this power see the cases relating to the staying of proceedings cited in note 2 supra.

UPDATE

129 Discretionary stay of proceedings

NOTE 2--Where a foreign court is due to decide whether it is the first seised in relation to a dispute which is also the subject of an appeal in England, it is incumbent on the English court to stay the proceedings in order to avoid wasting costs and court resources even if the judgment below was not erroneous: *Bentinck v Bentinck*[2007] EWCA Civ 175, [2007] 2 FCR 267. See also *The Trademark Licensing Company Ltd v Leofelis SA*[2009] EWHC 3285 (Ch), [2009] All ER (D) 124 (Dec).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(5) STAY OF PROCEEDINGS/(ii) Stay of Proceedings under National Law/130. General principle.

(ii) Stay of Proceedings under National Law

130. General principle.

The question whether an English court has or may exercise jurisdiction in a particular case is dealt with elsewhere in this title¹. Even when the court may exercise such jurisdiction, it still has a discretion² to act in the interests of justice by ordering a stay of proceedings which have been commenced before it³. This power is to be distinguished from the issuing of an injunction to restrain a party who has brought, or who threatens to bring, proceedings before a foreign court⁴, and from the putting of a party to his election as to which of two sets of proceedings that he has commenced will be pursued⁵. The power to order a stay⁶ is in all cases discretionary and will be exercised in the interests of justice⁷.

Where a stay is sought on the ground that the parties have by contract agreed that the courts of a foreign country are to have jurisdiction over a dispute, and it is argued that the bringing of proceedings in England is a breach of that contract, the discretion is guided by separate considerations⁸.

The power of the court to grant interim relief pending trial or pending the determination of an appeal extends to a case where the issue to be tried or which is the subject of the appeal relates to the jurisdiction of the court to entertain the proceedings, or the proceedings involve the reference of any matter to the European Court⁹ under the 1971 Protocol¹⁰, or the proceedings involve the reference of any matter relating to the 'Brussels I' Regulation to the European Court¹¹. This does not restrict any such powers as the court otherwise has¹². The High Court also has power to grant injunctions and other means of interim relief in cases where proceedings within the scope of the Regulation (whether or not the Regulation has effect in relation to them) have been, or are to be, brought in a Brussels or Lugano contracting state or in a Regulation state or in another part of the United Kingdom¹³.

1 See para 62 et seq ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 Supreme Court Act 1981 s 49(3); Civil Jurisdiction and Judgments Act 1982 s 49 (amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 2 para 24).

3 See *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, [1986] 3 All ER 843, HL. As to the operation of the principle contained in this decision see the cases cited in para 131 post. As to the special considerations that apply when the court has jurisdiction by reason of the provisions of the 'Brussels I' Regulation or the Brussels or Lugano Convention see para 129 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

4 See para 137 post.

5 See para 134 post.

6 As to circumstances in which a court will stay its proceedings see paras 131-135 post. As to the position under the 'Brussels I' Regulation and Brussels and Lugano Conventions where a stay is mandatory in certain circumstances see paras 127-128 ante.

7 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, [1986] 3 All ER 843, HL.

8 See para 132 post.

9 As to the meaning of 'European Court' see para 68 note 2 ante.

10 Civil Jurisdiction and Judgments Act 1982 s 24(1) (amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt IV para 9(a)). For the meaning of 'the 1971 Protocol' see para 65 note 2 ante.

11 Civil Jurisdiction and Judgments Act 1982 s 24(1) (as amended: see note 10 supra). Such a reference as is referred to in the text is a reference made under the EC Treaty (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 68.

12 Civil Jurisdiction and Judgments Act 1982 s 24(3).

13 See *ibid* s 25 (as amended); and para 138 post. For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante. For the meaning of 'United Kingdom' see para 4 ante.

UPDATE

130 General principle

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(5) STAY OF PROCEEDINGS/(ii) Stay of Proceedings under National Law/131. Forum non conveniens.

131. Forum non conveniens.

The court has power at any stage of the proceedings¹ to order a stay on the ground of forum non conveniens where to do so is not inconsistent with the 'Brussels I' Regulation or with the Brussels or Lugano Conventions². As a general rule the party seeking the stay (usually the defendant) must establish that there exists another forum to whose jurisdiction he is amenable, and which is clearly or distinctly more appropriate than England for the trial of the action³. If the defendant fails to establish this, a stay on this ground will not be granted; if the defendant succeeds in establishing it, the claimant will nevertheless be permitted to proceed in England, and the action will not be stayed, if in the interests of justice the action should be permitted to proceed⁴.

In determining whether there is another forum clearly or distinctly more appropriate than England for the trial of the action, the court is entitled to take into account all factors connected to the parties, the claim or the action, including:

- 83 (1) the residence of the parties⁵;
- 84 (2) the factual connections between the dispute and the courts, such as the place where the relevant events occurred and the residence of the witnesses⁶;
- 85 (3) the law which will be applied to resolve the dispute⁷;
- 86 (4) the possibility of a *lis alibi pendens* or other related proceedings⁸; and
- 87 (5) the question whether other persons may become parties to the litigation⁹.

The question of which factors are relevant, and the weight to be accorded to each of them (which will vary from case to case)¹⁰, is essentially one for the discretion of the trial judge¹¹, with whose assessment an appellate court will be reluctant to interfere¹².

In determining whether, even though the forum conveniens lies elsewhere, the interests of justice nevertheless favour allowing the claimant to proceed in England¹³ (the burden of proof lying in this instance with the claimant¹⁴), the general rules permit the claimant to allege that the quality of justice, or some individual aspect of it, available to him in the foreign forum would be inferior¹⁵. If, however, the claimant clearly¹⁶ establishes that he would not obtain a fair hearing in the foreign court¹⁷, or that a time bar would mean the case would not be heard at all in the foreign court (except where the claimant has culpably failed to issue proceedings to save limitation in the foreign forum)¹⁸, or that the costs of the action in the foreign court would deprive him of the fruits of his victory¹⁹, or that he would lose in the foreign court despite the fact that he would win in England²⁰, it may still be proper for the court to permit the English proceedings to continue, although the question remains a discretionary one.

1 Where the court has jurisdiction over the dispute, the application for a stay should be made as soon as possible: *Mansour v Mansour* [1990] FCR 17, CA. If the application is dismissed, it is permissible to reapply for a stay at a later date if changing circumstances justify it: *Owens Bank Ltd v Bracco* [1992] 2 AC 443 at 474, [1991] 4 All ER 833, CA; *affd* on other grounds [1992] 2 AC 443 at 474, [1992] 2 All ER 193, HL. An application for a stay is not a challenge to the jurisdiction under RSC Ord 12 r 8 (now CPR 10.1(3)(b)): *Astro Exito Navegacion SA v WT Hsu, The Messiniaki Tolmi* [1984] 1 Lloyd's Rep 266, CA; *Bankers Trust Co v Galadari* [1987] QB 222, [1986] 2 Lloyd's Rep 446, CA. But if, after making such an application, the applicant elects to take a step in the proceedings which is inconsistent with his plea that the court should decline jurisdiction, he may forfeit the right to apply for the stay: *Ngcobo v Thor Chemicals Holdings Ltd* (1995) Times, 10 November, CA. As to the weight to be given to cases concerning matters of civil procedure decided before 26 April 1999 (ie the date on which the Civil Procedure Rules came into force) see CIVIL PROCEDURE.

Where an application by a defendant to stay proceedings is preceded by an application by the claimant for summary judgment, the application for summary judgment ought to be heard first: *Merrill Lynch, Pierce Fenner and Smith Inc v Raffa* (2000) Times, 14 June.

2 See the Civil Jurisdiction and Judgments Act 1982 s 49 (as amended); and para 130 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. As to the discretionary stay of proceedings see para 129 ante. As to the interaction between the doctrine of forum non conveniens and the 'Brussels I' Regulation and the Conventions see para 94 ante. As to grounds for a stay other than the ground of forum non conveniens see paras 132-133 post.

3 The evidence on which the application for a stay is based should be directed to the situation at the date the application was made, although the court should also have some regard to the situation at the date of the hearing: *Mohammed v Bank of Kuwait* [1996] 1 WLR 1483, CA. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, [1986] 3 All ER 843, HL (applied in *Bank of Credit & Commerce Hong Kong Ltd (in liquidation) v Sonali Bank* [1995] 1 Lloyd's Rep 227); *Berezovsky v Michaels* [2000] 2 All ER 986, [2000] 1 WLR 1004, HL. The statement of principle given in *Spiliada Maritime Corp v Cansulex Ltd* supra supersedes earlier House of Lords decisions such as those in *The Atlantic Star* [1974] AC 436, [1973] 2 All ER 175, HL; *Rockware Glass Ltd v MacShannon* [1978] AC 795, [1978] 1 All ER 625, HL; *The Abidin Daver* [1984] AC 398, [1984] 1 All ER 470, HL. It is, however, clear from these decisions that the principles apply in identical fashion to admiralty actions in rem.

See also *D v P (forum conveniens)* [1998] 2 FLR 25 (appropriate forum for proceedings for financial provision).

5 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 478, 481-482, [1986] 3 All ER 843 at 856, 858-859, HL. See also *New Hampshire Insurance Co v Aerospace Finance Ltd* [1998] 2 Lloyd's Rep 539; *Lubbe v Cape plc* [2000] 4 All ER 268, [2000] 1 WLR 1545, HL (stay refused on basis that English courts had the experience and facilities better to deal with the claim brought by a large number of claimants).

6 But if they are expert witnesses they may be expected to be able to travel: *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 469, [1986] 3 All ER 843 at 849 (citing Staughton J, whose judgment at first instance is unreported). This factor may be of greater significance in jurisdictions which place greater reliance upon the oral testimony of witnesses.

In cases of tort, the appropriate jurisdiction is prima facie that where the tort was committed: *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey, The Albaforth* [1984] 2 Lloyd's Rep 91, CA; *Schapira v Ahronson* [1999] EMLR 735, CA; *Berezovsky v Michaels* [2000] 2 All ER 986, [2000] 1 WLR 1004, HL.

7 *Trendtex Trading Corp v Crédit Suisse* [1982] AC 679, [1981] 3 All ER 520, HL; cf *Charm Maritime Inc v Kyriakou* [1987] 1 Lloyd's Rep 433, CA; *Crédit Chimique v James Scott Engineering Group Ltd* 1982 SLT 131; *CGU International Insurance plc v Szabo* [2002] 1 All ER (Comm) 83 (where related proceedings have already commenced in a foreign jurisdiction, an action may proceed before an English court if both courts are likely to be called on to determine the choice of law of a contract and a strong argument exists that English law governs the contract).

It is not appropriate for a claimant, in a case governed by English law, to seek damages in a forum other than the most natural forum: *HIB Ltd v Guardian Insurance Co Inc* [1997] 1 Lloyd's Rep 412 (party preferred law of Virgin Islands, where it was based, in order to claim bad faith damages in a punitive form).

8 *The El Amria* [1981] 2 Lloyd's Rep 119, CA; *The Abidin Daver* [1984] AC 398 at 411-412, [1984] 1 All ER 470 at 476-477, HL; *Cleveland Museum of Art v Capricorn International SA* [1990] 2 Lloyd's Rep 166, CA; *Meadows Indemnity Co Ltd v Insurance Corp of Ireland plc* [1989] 2 Lloyd's Rep 298, CA.

9 Cf *First National Bank of Boston v Union Bank of Switzerland* [1990] 1 Lloyd's Rep 32, CA; *New Hampshire Insurance Co v Strabag Bau AG* [1992] 1 Lloyd's Rep 361, CA; *Kinnear v Falconfilms NV* [1994] 3 All ER 42. The Court of Appeal is entitled, notwithstanding any earlier Court of Appeal decision, to reconsider the question of appropriate forum when a group action enters the litigation: *Lubbe v Cape plc* [2000] 4 All ER 268, [2000] 1 WLR 1545, HL.

10 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 481, [1986] 3 All ER 843 at 858, HL.

11 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 465, [1986] 3 All ER 843 at 846, HL.

12 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 465, [1986] 3 All ER 843 at 846, HL.

13 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 465, 478, [1986] 3 All ER 843 at 846, 856, HL. In determining whether justice requires that a trial takes place in the English court, the court may consider the

question of whether an alternative forum is available, in practical terms, to the claimant: *Askin v Absa Bank Ltd* [1999] IL Pr 471, CA. The availability of legal aid in another jurisdiction may be a relevant consideration where circumstances dictate that the case would not be tried at all otherwise and substantial justice could be done in the place where the resources were available: *Connelly v RTZ Corp plc* [1998] AC 854, [1997] 4 All ER 335, HL; *Carlson v Rio Tinto plc* [1999] CLC 551.

Even where foreign proceedings are in progress, an English court can grant a negative declaration of non-liability to the claimant if it is in the interests of justice to do so: *Smyth v Behbehani* [1999] IL Pr 584, CA (where it was in the interests of justice for all proceedings relating to comparable transactions to be heard at the same time).

14 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 478, [1986] 3 All ER 843 at 856, HL.

15 *The Abidin Daver* [1984] AC 398, [1984] 1 All ER 470, HL; *Muduroglu Ltd v TC Ziraat Bankasi* [1986] QB 1225, [1986] 3 All ER 682, CA; *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 482-483, [1986] 3 All ER 843 at 859-860, HL. But if there has been very similar litigation on a similarly difficult topic, the interests of justice may require that this expertise be re-used by permitting the English action to proceed: see *Spiliada Maritime Corp v Cansulex Ltd* supra at 465, 484-486 and 846, 861-862, HL. This is known as the 'Cambridgeshire' factor (referring to one of the vessels in *Spiliada Maritime Corp v Cansulex Ltd* supra).

16 *The Abidin Daver* [1984] AC 398 at 410, [1984] 1 All ER 470 at 475, HL.

17 Cf *Purcell v Khayat* (1987) Times, 23 November.

18 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 483-484, [1986] 3 All ER 843 at 860-861, HL; *The Pioneer Container, KH Enterprise (cargo owners) v Pioneer Container (owners)* [1994] 2 AC 324 at 347, [1994] 2 All ER 250 at 267-268, PC. See also *Baghlaf Al Zafer Factory Co BR for Industry Ltd v Pakistan National Shipping Co* [1998] 2 Lloyd's Rep 229, CA (if it was not unreasonable for the claimant not to have started proceedings before the expiry of the limitation period in the agreed forum, a stay may be refused unless the defendant waives the time bar).

19 *The Vishva Ajay* [1989] 2 Lloyd's Rep 558; *Roneleigh Ltd v MII Exports Inc* [1989] 1 WLR 619, CA; *The Al Battani* [1993] 2 Lloyd's Rep 219; *Agrafax Public Relations Ltd v United Scottish Society Inc* [1995] IL Pr 753, CA; *Radhakrishna Hospitality Service Private Ltd v EIH Ltd* [1999] 2 Lloyd's Rep 249; *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 All ER 979, [2002] 1 WLR 1269.

20 *Banco Atlantico SA v The British Bank of the Middle East* [1990] 2 Lloyd's Rep 504, CA; *Britannia Steamship Insurance Association Ltd v Ausonia Assicurazioni SpA* [1984] 2 Lloyd's Rep 98, CA (although these decisions may depend on the conclusion that the foreign court, in finding for the defendant, would be acting contrary to generally accepted principles of private international law). Cf *The Hamburg Star* [1994] 1 Lloyd's Rep 399 at 410.

UPDATE

131 Forum non conveniens

NOTE 3--See *Bristow Helicopters Ltd v Sikorsky Aircraft Corp* [2004] EWHC 401 (Comm), [2004] 2 Lloyd's Rep 150 (higher level of damages available in foreign jurisdiction not a proper consideration in determining appropriate forum).

NOTE 5--See also *Ivax Pharmaceuticals UK Ltd v Akzo Nobel NV* [2005] EWHC 2658 (Ch), [2006] FSR 888.

NOTE 14--Where a defendant wishes to set aside an order for permission to serve out of the jurisdiction on the basis that the action involves or may involve issues which it would be appropriate to try in a court or courts outside the jurisdiction, it is incumbent on him, so far as possible, to identify the issues concerned and to state as clearly as possible how they arise or may arise in the proceedings: *Limit (No 3) Ltd v PDV Insurance Co* [2005] EWCA Civ 383, [2005] 2 All ER (Comm) 347.

NOTE 15--Unsubstantiated allegations of political interference or judicial impropriety in the other forum do not suffice to establish that justice will not be served: *Pacific International Sports Clubs Ltd v Soccer Marketing International Ltd* [2009] EWHC 1839 (Ch), [2009] All ER (D) 173 (Aug).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(5) STAY OF PROCEEDINGS/(ii) Stay of Proceedings under National Law/132. Breach of jurisdiction clause.

132. Breach of jurisdiction clause.

A court has power¹ to stay proceedings brought in England in breach of a provision in a contract, known as a jurisdiction clause, that such disputes are to be referred to the exclusive jurisdiction of a foreign court². This power will be exercised on the defendant's application unless the claimant establishes that it is just and proper to allow the English action to proceed; the burden of proof is on the claimant, who must establish a strong case before being allowed to break his contract³. But where the jurisdiction clause confers jurisdiction upon the courts of another 'Brussels I' Regulation state or another contracting state to the Brussels or Lugano Conventions⁴, the court will be deprived of jurisdiction altogether⁵, and the proceedings should be dismissed as being without jurisdiction, rather than stayed⁶. If, however, the defendant agrees to appear, he waives the breach, and his submission confers jurisdiction upon the court⁷.

A stay will not be granted if the foreign jurisdiction clause contravenes a statutory provision forbidding ouster of the jurisdiction of the English court in a certain type of case⁸, nor where the term, or the entire contract, is void or otherwise unenforceable⁹. Nor will a stay be granted where the court on which the contract purports to confer jurisdiction is no longer the same as that contemplated by the parties at the time of the making of the contract¹⁰.

It is for the proper law of the contract¹¹ to determine whether a foreign jurisdiction clause provides for the exclusive jurisdiction of the courts of a country or merely that the parties will not object to the exercise of jurisdiction by those courts (as where a 'non-exclusive jurisdiction' clause is used)¹². The burden of proving that the clause purports to confer exclusive jurisdiction over the dispute in question, or obliges the claimant to sue in the nominated court, is on the defendant who relies on it¹³. If, on its proper construction, the clause gives non-exclusive jurisdiction to the foreign court, an application for a stay will be determined in accordance with the general principle governing stays on the ground of forum non conveniens¹⁴.

In exercising its discretion to grant or refuse a stay¹⁵, the court will consider all the circumstances of the case, including in particular¹⁶:

- 88 (1) in what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts;
- 89 (2) whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects;
- 90 (3) with what country either party is connected, and how closely;
- 91 (4) whether the defendant genuinely desires trial in the foreign country, or is only seeking procedural advantages¹⁷; and
- 92 (5) whether the claimant would be:

11

15. (a) prejudiced by having to sue in the foreign court because he would be deprived of security for his claim; or

16. (b) unable to enforce any judgment obtained; or

17. (c) faced by a time-bar not applicable in England; or

18. (d) for political, racial, religious or other reasons, unlikely to get a fair trial¹⁸.

12

Although these matters are similar to those taken into account on an application for a stay on the ground of forum non conveniens¹⁹, the two tests are separate and may not be elided²⁰, for the presumption here is strong that a stay should be granted.

1 See the Supreme Court Act 1981 s 49(3); and para 130 ante. The court also has an inherent jurisdiction to stay the proceedings: see *Racecourse Betting Control Board v Secretary for Air* [1944] Ch 114 at 126, [1944] 1 All ER 60 at 65, CA; *The Fehmarn* [1958] 1 All ER 333 at 336-337, [1958] 1 WLR 159 at 163-164, CA; *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 All ER 992, [1973] 1 WLR 349 at 362.

2 *Law v Garrett* (1878) 8 ChD 26, CA; *Austrian Lloyd SS Co v Gresham Life Assurance Society Ltd* [1903] 1 KB 249, CA; *Kirchner & Co v Gruban* [1909] 1 Ch 413; *The Cap Blanco* [1913] P 130, CA; *The Athenée* (1922) 11 Ll L Rep 6, CA; *The Media* (1931) 41 Ll L Rep 80; *The Vestris* (1932) 43 Ll L Rep 86; *The Fehmarn* [1958] 1 All ER 333, [1958] 1 WLR 159, CA; *The Eleftheria* [1970] P 94, [1969] 2 All ER 641; *The Makefjell* [1976] 2 Lloyd's Rep 29, CA; *Carvalho v Hull Blyth (Angola) Ltd* [1979] 3 All ER 280, [1979] 1 WLR 1228, CA; *The El Amria* [1981] 2 Lloyd's Rep 119, CA; *DSV Silo-und Verwaltungsgesellschaft mbH v Sennar (Owners)*, *The Sennar* [1985] 2 All ER 104, [1985] 1 WLR 490, HL; *British Aerospace plc v Dee Howard Corp* [1993] 1 Lloyd's Rep 368; *The Pioneer Container, KH Enterprise (cargo owners) v Pioneer Container (owners)* [1994] 2 AC 324 at 347, [1994] 2 All ER 250 at 267, PC.

The English court also has power to restrain proceedings abroad begun in breach of a clause in a contract conferring exclusive jurisdiction on English courts: *Mike Trading and Transport Ltd v R Pagnan & Fratelli, The Lisboa* [1980] 2 Lloyd's Rep 546, CA (injunction refused notwithstanding that proceedings might be in breach of such a clause). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 It is insufficient for him to establish merely that England is the natural forum for the proceedings, for it is more natural for the court to uphold a contract freely entered into: *The Fehmarn* [1957] 2 All ER 707 at 710, [1957] 1 WLR 815 at 819-820; *The Eleftheria* [1970] P 94 at 99, [1969] 2 All ER 641 at 645; *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 All ER 992 at 1001 (on appeal [1973] 1 WLR 349 at 362-363, 375, CA); *The Kislovodsk* [1980] 1 Lloyd's Rep 183; *The El Amria* [1981] 2 Lloyd's Rep 119, CA; *DSV Silo-und Verwaltungsgesellschaft mbH v Sennar (Owners)*, *The Sennar* [1985] 2 All ER 104, [1985] 1 WLR 490, HL; *The Pioneer Container, KH Enterprise (cargo owners) v Pioneer Container (owners)* [1994] 2 AC 324, [1994] 2 All ER 250, PC; *British Aerospace plc v Dee Howard Corp* [1993] 1 Lloyd's Rep 368.

4 As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

5 Ie by virtue of the 'Brussels I' Regulation art 23; the Brussels Convention art 17; or the Lugano Convention art 17: see para 79 ante.

6 See para 79 ante.

7 See the 'Brussels I' Regulation art 24; the Brussels Convention art 18; the Lugano Convention art 18; and para 78 note 6 ante.

8 *The Hollandia* [1983] 1 AC 565, [1982] 3 All ER 1141, HL. But note that, in the context of the 'Brussels I' Regulation and the Brussels and Lugano Conventions, it is less clear that the arguments given in the text here and at notes 9-10 infra may be deployed to resist the enforcement of the clause: see para 79 text and notes 16-19 ante.

9 *Re Jogia* [1988] 2 All ER 328 at 335, [1988] 1 WLR 484 at 492; *The Emre II* [1989] 2 Lloyd's Rep 182; *Mackender v Feldia AG* [1967] 2 QB 590, [1966] 3 All ER 847, CA. See further *The Hollandia* [1983] 1 AC 565, [1982] 3 All ER 1141, HL (foreign jurisdiction clause held void as amounting to lower limitation of liability under bill of lading than permitted by the Hague-Visby rules). See also, however, *The Benarty, RA Lister & Co Ltd v EG Thomson (Shipping) Ltd* [1985] QB 325, [1984] 3 All ER 961, CA (foreign jurisdiction clause valid where reduced limit of liability under bill of lading was provided for by foreign statute expressly preserved by Hague-Visby rules).

10 *Carvalho v Hull Blyth (Angola) Ltd* [1979] 3 All ER 280, [1979] 1 WLR 1228, CA.

11 For the meaning of 'the proper law (of a contract)' see para 349 note 7 post.

12 See *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349 at 361, citing *Hoerler (t/a CF Mumm) v Hanover Caoutchouc Gutta Percha and Telegraph Works* (1893) 10 TLR 22 (on appeal (1893) 10 TLR 103, CA); *Sohio Supply Co v Gatoil (USA) Inc* [1989] 1 Lloyd's Rep 588, CA; *S & W Berisford plc v New Hampshire Insurance Co* [1990] 2 QB 631 at 637, [1990] 3 WLR 688 at 693 (overruled on other grounds by *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72, [1991] 4 All ER 334, CA); *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 2 All ER 540, [1994] 1 WLR 588, CA; *Sinochem International Oil (London) Ltd v Mobil Sales and Supply*

Corpn Ltd (Sinochem International Oil Co Ltd, third party) [2000] 1 Lloyd's Rep 670 (the test for determining whether a jurisdiction clause is exclusive or non-exclusive does not depend upon the use of the word 'exclusive' but upon whether the clause obliges resort to the courts chosen). There is a clear tendency to construe ambiguous clauses in favour of exclusive jurisdiction, especially where the nominated court would in the absence of a clause still have had jurisdiction. The Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ L226, 9.10.80, p 1) excludes agreements on choice of law from its scope: art 1(2)(d) (see para 350 text to note 10 post). This law should in principle determine who is to be bound by the agreement; but for a case in which English law rather than the proper law was applied see *The Pioneer Container, KH Enterprise (cargo owners) v Pioneer Container (owners)* [1994] 2 AC 324, [1994] 2 All ER 250, PC (bailor bound by clause agreed between bailee and sub-bailee, whose contract was governed by Chinese law).

13 *DSV Silo-und Verwaltungsgesellschaft mbH v Sennar (Owners), The Sennar (No 2)* [1984] 2 Lloyd's Rep 142 (affd [1985] 2 All ER 104, [1985] 1 WLR 490, HL); *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349 at 361. In relation to the scope of the clause and the actions which will be subject to it see *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701, [1993] 3 All ER 897, CA.

14 See para 131 ante. But it will follow from the clause that there is a court to whose jurisdiction the defendant is amenable. Where a contract contains a non-exclusive English jurisdiction clause, the English court ought to hold the parties to the agreed jurisdiction unless there are overwhelming reasons to the contrary: *Mercury Communications Ltd v Communication Telesystems International* [1999] 2 All ER (Comm) 33.

15 The discretion should be exercised in favour of granting a stay unless strong cause is shown for not doing so: *The Eleftheria* [1970] P 94 at 99-100, [1969] 2 All ER 641 at 645.

16 *The Eleftheria* [1970] P 94, [1969] 2 All ER 641; *Aratra Potato Co Ltd v Egyptian Navigation Co, The El Amria* [1981] 2 Lloyd's Rep 119, CA; *The Pioneer Container, KH Enterprise (cargo owners) v Pioneer Container (owners)* [1994] 2 AC 324, [1994] 2 All ER 250, PC.

17 Delay in applying for a stay will be taken into account: *The Vestris* (1932) 43 Ll L Rep 86.

18 *The Eleftheria* [1970] P 94 at 99-100, [1969] 2 All ER 641 at 645.

19 See para 131 ante.

20 See *Aratra Potato Co Ltd v Egyptian Navigation Co, The El Amria* [1981] 2 Lloyd's Rep 119, CA; *British Aerospace plc v Dee Howard Corpn* [1993] 1 Lloyd's Rep 368; *The Pioneer Container, KH Enterprise (cargo owners) v Pioneer Container (owners)* [1994] 2 AC 324, [1994] 2 All ER 250, PC. Cf *Hamed El Chiaty & Co (t/a Travco Nile Cruise Lines) v Thomas Cook Group Ltd, The Nile Rhapsody* [1992] 2 Lloyd's Rep 399 at 401; affd on other grounds [1994] 1 Lloyd's Rep 382, CA.

UPDATE

132 Breach of jurisdiction clause

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(5) STAY OF PROCEEDINGS/(ii) Stay of Proceedings under National Law/133. Abuse of process.

133. Abuse of process.

It is open to an English court to stay proceedings which have been brought, even if there is no other forum in which they could be brought, if they amount to an abuse of the process of the court, or if they are vexatious or harassing to the defendant¹.

¹ *The Christiansborg* (1885) 10 PD 141, CA; *Re Norton's Settlement, Norton v Norton* [1908] 1 Ch 471, CA. See also CPR 3.4(2); and CIVIL PROCEDURE vol 11 (2009) PARA 520. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(5) STAY OF PROCEEDINGS/(ii) Stay of Proceedings under National Law/134. Parallel proceedings.

134. Parallel proceedings.

Where a claimant has commenced proceedings which are substantially identical in two courts, he may be put to his election and required to discontinue those with which he elects not to proceed¹.

¹ *Peruvian Guano Co v Bockwoldt* (1883) 23 ChD 225, CA; *Australian Commercial Research & Development Ltd v ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65. This involves the dismissal of proceedings, rather than merely a stay: *Australian Commercial Research & Development Ltd v ANZ McCaughan Merchant Bank Ltd* supra. Cf *Advanced Portfolio Technologies Inc v Ainsworth* [1996] FSR 217, where the court would not order a stay of English proceedings but would restrain a claimant from proceeding in a foreign jurisdiction (see para 137 post). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(5) STAY OF PROCEEDINGS/(ii) Stay of Proceedings under National Law/135. Matrimonial proceedings.

135. Matrimonial proceedings.

Where matrimonial proceedings are pending in respect of the same marriage both in England and in another jurisdiction, the English court, in addition to its inherent power to order a stay, has the power, and in some cases the duty, to order a stay in respect of the English proceedings under the provisions of the 'Brussels II' Regulation or the Domicile and Matrimonial Proceedings Act 1973¹.

¹ See paras 245-250 post. As to the 'Brussels II' Regulation see para 242 note 4 post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(6) INJUNCTION TO RESTRAIN FOREIGN PROCEEDINGS/(i) Provisional and Protective Measures under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/136. Provisional and protective measures.

(6) INJUNCTION TO RESTRAIN FOREIGN PROCEEDINGS

(i) Provisional and Protective Measures under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

136. Provisional and protective measures.

Within the scope of the 'Brussels I' Regulation and the Brussels or Lugano Convention¹, application may be made to the courts of a Regulation state or contracting state² for such provisional, including protective, measures as may be available under the law of that state³. This applies even if, under the 'Brussels I' Regulation and the Brussels or Lugano Convention, or the scheme applicable within the United Kingdom⁴, the courts of another Regulation state or contracting state or, as the case may be, of another part of the United Kingdom, have jurisdiction as to the substance of the matter⁵.

1 As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

2 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

3 'Brussels I' Regulation art 31; Brussels Convention art 24; Lugano Convention art 24. See also the Civil Jurisdiction and Judgments Act 1982 s 16(1), Sch 4 rule 16 (s 16(1) amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt II para 3(a); and the Civil Jurisdiction and Judgments Act 1982 Sch 4 substituted by the Civil Jurisdiction and Judgments Order 2001, Sch 2 Pt II para 4). This provision allows measures to be taken which preserve a factual or legal situation in favour of a litigant in another Regulation state or contracting state which has jurisdiction over the substantive hearing: Case C-261/90 *Reichert v Dresdner Bank AG (No 2)* [1992] ECR I-2149, ECJ. See further para 137 post.

4 As to the adaptation of the provisions of the Conventions by the Civil Jurisdiction and Judgments Act 1982 s 16 (as amended), Sch 4 (as substituted) to a scheme applying as between parts of the United Kingdom see para 66 ante. As to the interpretation of the scheme by reference to decisions under the Brussels Convention or the 'Brussels I' Regulation see para 70 ante. For the meaning of 'United Kingdom' see para 4 ante; and for the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

5 'Brussels I' Regulation art 31; Brussels Convention art 24; Lugano Convention art 24. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 16 (Sch 4 as substituted: see note 3 supra).

A court may hear an application for interim measures arising from a dispute between parties who have contractually excluded the jurisdiction of courts in favour of arbitration proceedings on the basis of a real connecting link between the territorial jurisdiction of the court and the subject matter of the measures sought: Case C-391/95 *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco Line* [1999] QB 1225, [1998] ECR I-7091, ECJ.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(6) INJUNCTION TO RESTRAIN FOREIGN PROCEEDINGS/(ii) Provisional and Protective Measures under Statutory Powers/137. Injunction to restrain foreign proceedings.

(ii) Provisional and Protective Measures under Statutory Powers

137. Injunction to restrain foreign proceedings.

If the court has jurisdiction¹ over a person ('the respondent') who has commenced, or who threatens to commence², proceedings against a party ('the applicant') in a foreign court, the court may issue an injunction to restrain the respondent from continuing with or commencing such foreign proceedings. The general basis upon which the court will restrain the respondent will be that it is inequitable for the respondent so to act³. The injunction is directed at the respondent and not to the judge in the foreign court⁴, but the power to order an injunction is exercised with great caution⁵.

The jurisdiction of the court over the respondent must be established in accordance with the normal principles of jurisdiction in personam⁶. Thus it must be lawful for him to be served with process of the English court, and if the respondent has a defence to the assertion of jurisdiction over him he will be entitled, on application⁷, to have service of process set aside⁸.

If the court has jurisdiction over the respondent, it will order an injunction if in all the circumstances of the case it is equitable so to do⁹. The categories of case in which the court will act are not fixed¹⁰, but the ground most commonly used is that it is oppressive or vexatious for the respondent to continue the proceedings against the applicant¹¹; and the court will generally also require it to be shown that England constitutes the natural forum for the litigation of the respondent's claim against the applicant¹². The jurisdiction will be exercised sparingly¹³, but if the applicant can establish that the foreign proceedings constitute the breach of an exclusive jurisdiction clause, the order will be granted, unless strong cause or strong reasons are shown that it should not¹⁴.

1 See para 62 et seq ante.

2 The court will normally require the challenge first to be brought in the foreign court itself: *Arab Monetary Fund v Hashim (No 6)* (1992) Times, 24 July; *Pan American World Airways Inc v Andrews* 1992 SLT 268, Ct of Sess; *Barclays Bank plc v Homan* [1993] BCLC 680, CA; *Bank of Tokyo v Karoon (Note)* [1987] AC 45 at 63, [1986] 3 All ER 468, CA; *Amchem Products Inc v Workers' Compensation Board* [1993] 1 SCR 897 at 931, Can SC. It will also normally expect any threat to sue, which is relied on as the ground for application, to be immediate: *Petromin SA v Secnav Marine Ltd* [1995] 1 Lloyd's Rep 603.

3 *Carron Iron Co v Maclaren* (1855) 5 HL Cas 416 at 439; *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871, 892, [1987] 3 All ER 510, PC; *Advanced Portfolio Technologies Inc v Ainsworth* [1996] FSR 217; and see *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 at 573, [1981] 1 All ER 143, HL

The court's general jurisdiction in this regard is independent of whether the foreign proceedings are brought in a Regulation state or in a contracting state. However, the question of whether the grant of restraining orders by an English court is inconsistent with the Brussels Convention has been referred to the European Court of Justice: see *Turner v Grovit* [2001] UKHL 65, [2002] 1 All ER 960n, [2002] 1 WLR 107 (under English law, the Court of Appeal had been entitled to make the orders). For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante. As to the Brussels Convention see para 65 note 2 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 *Lord Portarlington v Soulby* (1834) 3 My & K 104; *Carron Iron Co v Maclaren* (1855) 5 HL Cas 416; *Earl of Oxford's Case* (1615) 1 Rep Ch 1; *Lett v Lett* [1906] 1 IR 618; *Bushby v Munday* (1821) 5 Madd 297.

5 *Settlement Corp v Hochschild* [1966] Ch 10, [1965] 3 All ER 486; *Castanho v Brown & Root (UK) Ltd* [1981] AC 557, [1981] 1 All ER 143, HL; *British Airways Board v Laker Airways Ltd* [1985] AC 58, [1984] 3 All ER

39, HL; *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871, [1987] 3 All ER 510, PC; *Ascot Commodities NV v Northern Pacific Shipping, The Irini A* [1999] 1 Lloyd's Rep 196.

6 See para 62 et seq ante.

7 See para 64 ante.

8 However, the 'Brussels I' Regulation and the Brussels and Lugano Conventions may deprive the court of a jurisdiction which, but for the Regulation or Conventions, it would have had. For instance, if the respondent is domiciled in a Regulation state or contracting state, the personal jurisdiction of the court over him may not be established in accordance with the rules of art 3 of the applicable Regulation or Convention, and it will be insufficient that he is present within the jurisdiction of the court: see para 83 text and note 12 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Lugano Convention see para 65 note 3 ante.

An anti-suit injunction is not expressly available under art 31 of the 'Brussels I' Regulation or art 24 of the Conventions (see para 136 ante), nor under CPR 6.20(2) (which applies only to conduct within the jurisdiction: see para 100 ante) or under CPR 6.20(4) (which applies only to claims under the Civil Jurisdiction and Judgments Act 1982 s 25: see paras 102 ante, 138 post). However, where a valid exclusive English jurisdiction agreement fulfils the requirements of art 17 of the Brussels Convention (cf art 23 of the 'Brussels I' Regulation) (see para 79 ante), and because the Civil Jurisdiction and Judgments Act 1982 s 49 does not refer to injunctions (see para 131 note 2 ante), it has been held to be not inconsistent with the Brussels Convention to exercise the jurisdiction conferred by the Supreme Court Act 1981 s 37 (see para 138 post) to grant an anti-suit injunction where it is just and convenient to do so: *OT Africa Line Ltd v Hijazy, The Kribi* [2001] 1 Lloyd's Rep 76. The issue of whether the court may restrain a respondent over whom it has jurisdiction from taking proceedings in the courts of another Regulation state or contracting state was considered not to be a relevant objection in *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 2 All ER 540, [1994] 1 WLR 588, CA. See also *Aggeliki Charis Compania Maritima SA v Pagnan SpA, The Angelic Grace* [1995] 1 Lloyd's Rep 87, CA. It might be argued that art 27 of the 'Brussels I' Regulation and art 21 of the Conventions (see para 128 ante) deprives the court of jurisdiction to make such an order.

9 See the cases cited in note 12 infra.

10 See the cases cited in notes 3 supra, 11 infra. Eg the court has jurisdiction to restrain a respondent from litigating in a foreign court matters which he could have raised in earlier English proceedings, but at the date at which this volume states the law, no injunction of the kind has been issued: see *Zeeland Navigation Co Ltd v Banque Worms, The Foresight Driller II* [1995] 1 Lloyd's Rep 251.

11 *British Airways Board v Laker Airways Ltd* [1985] AC 58, [1984] 3 All ER 39, HL; *South Carolina Insurance Co v Assurantie Maatschappij de Zeven Provinciën NV* [1987] AC 24, [1986] 3 All ER 487, HL; *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871, [1987] 3 All ER 510, PC; *Cohen v Rothfield* [1919] 1 KB 410, CA; *Settlement Corp v Hochschild* [1966] Ch 10 [1965] 3 All ER 486; and see *Smith Kline & French Laboratories Ltd v Bloch* [1983] 2 All ER 72, [1983] 1 WLR 730, CA; *Midland Bank plc v Laker Airways Ltd* [1986] QB 689, [1986] 1 All ER 526, CA; *Bank of Tokyo v Karoon (Note)* [1987] AC 45, [1986] 3 All ER 468, CA; *El du Pont de Nemours & Co and Endo Laboratories Inc v Agnew (No 2)* [1988] 2 Lloyd's Rep 240, CA; *Sohio Supply Co v Gatoil (USA) Inc* [1989] 1 Lloyd's Rep 588, CA; *Arab Monetary Fund v Hashim (No 6)* (1992) Times, 24 July; *Barclays Bank plc v Homan* [1993] BCLC 680, CA; *Amchem Products Inc v Workers' Compensation Board* [1993] 1 SCR 897, Can SC. In making this assessment, the consequences of ordering the injunction must be compared with the possible effect of not doing so. Where the failure to restrain the respondent would be to expose the applicant to the need to undertake further expensive litigation, covering the same issues, in order to obtain a contribution, this may constitute evidence of oppression: *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* supra. So too might the procedures inherent in the foreign proceedings: *Midland Bank plc v Laker Airways Ltd* supra; *Simon Engineering plc v Butte Mining plc (No 2)* [1996] 1 Lloyd's Rep 91 (the only advantage to the claimant of proceedings in the United States would be the contingency fee system and more generous pre-trial disclosure rules). It is clear from *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* supra, that the test is more demanding than that applied when a defendant seeks a stay of domestic proceedings, and that suggestions to the contrary in *Castanho v Brown & Root (UK) Ltd* [1981] AC 557, [1981] 1 All ER 143, HL, are not good law. See also *Barclays Bank plc v Homan* supra. An injunction to protect the jurisdiction of the court may be granted, but see *South Carolina Insurance Co v Assurantie Maatschappij de Zeven Provinciën NV* supra; *X AG v A Bank* [1983] 2 All ER 464, [1983] 2 Lloyd's Rep 535; *National Mutual Holdings Pty Ltd v Sentry Corp* (1989) 87 ALR 539, Aust Fed Ct; cf *Barclays Bank plc v Homan* supra.

It is for the party seeking the injunction to prove that the foreign proceedings are vexatious: *Ascot Commodities NV v Northern Pacific Shipping, The Irini A* [1999] 1 Lloyd's Rep 196.

12 *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871, [1987] 3 All ER 510, PC. If the respondent would be unable in England to prosecute the claim which he has commenced in the foreign court, it is unclear whether this condition needs to be satisfied, but in principle it should be sufficient that England is the natural forum for the dispute between the parties: see *British Airways Board v Laker Airways Ltd* [1985] AC 58, [1984] 3 All ER 39, HL; cf *Midland Bank plc v Laker Airways Ltd* [1986] QB 689, [1986] 1 All ER 526, CA; *Société*

Nationale Industrielle Aérospatiale v Lee Kui Jak supra. See also *Airbus Industrie GIE v Pate*[1999] 1 AC 119, [1998] 2 All ER 257, HL (even though the exercise of jurisdiction in the foreign courts was oppressive, an injunction was refused because the English jurisdiction had no interest in or connection with the matter in question); *Glencore International AG v Exter Shipping Ltd*[2002] EWCA Civ 528, [2002] 2 All ER (Comm) 1 (an English court has territorial jurisdiction to grant an anti-suit injunction against a party which joins existing proceedings before an English court on related issues).

13 See the cases cited in note 5 supra.

14 *Donohue v Armco Inc*[2001] UKHL 64, [2002] 1 All ER 749. See also *Sohio Supply Co v Gatoil (USA) Inc* [1989] 1 Lloyd's Rep 588, CA; *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 2 All ER 540, [1994] 1 WLR 588, CA; see also *Aggeliki Charis Compania Maritima SA v Pagnan SpA, The Angelic Grace* [1995] 1 Lloyd's Rep 87, CA; *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd*[1999] 1 All ER (Comm) 237 (exclusive jurisdiction clause enforced but only in relation to proceedings to which the clause directly related); *Bankers Trust Co v PT Jakarta International Hotels and Development*[1999] 1 All ER (Comm) 785 (giving effect to an arbitration clause included in the standard agreement developed by a world-wide commercial organisation was good reason to grant an injunction to restrain foreign proceedings); *Society of Lloyd's v White*(2000) Times, 14 April (injunction granted to enforce exclusive jurisdiction clause despite foreign court's refusal to stay proceedings); *National Westminster Bank v Utrecht-America Finance Co*[2001] EWCA Civ 658, [2001] 3 All ER 733 (injunction granted where foreign proceedings have commenced and would otherwise continue in breach of contract); *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500, [2001] 1 All ER (Comm) 530. Cf *British Airways Board v Laker Airways Ltd* [1985] AC 58, [1984] 3 All ER 39, HL; cf *Doherty v Allman* (1878) 3 App Cas 709.

The court is normally justified in refusing a stay in circumstances where the claimant submits to the foreign court's jurisdiction instead on relying upon the agreement to contest jurisdiction (*A/S D/S Svendborg v Wansa* [1996] 2 Lloyd's Rep 559; affd [1997] 2 Lloyd's Rep 183, CA), and where a party to a contract alleges fraud or mutual mistake in order to rescind the contract and breach an exclusive jurisdiction clause (*Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd*[1999] 1 All ER (Comm) 261).

See also *OT Africa Line Ltd v Hijazy, The Kribi* [2001] 1 Lloyd's Rep 76 (the grant of an anti-suit injunction to enforce an exclusive jurisdiction clause is not a violation of the right to a fair trial guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71; Cmd 8969) art 6).

UPDATE

137 Injunction to restrain foreign proceedings

NOTE 3--For European Court of Justice decision in *Turner*, cited, see Case C-159/02 *Turner v Grovit*[2005] 1 AC 101, ECJ (Brussels Convention precluded judicial authorities of a contracting state from issuing restraining orders in respect of proceedings in another contracting state). See *Elektrim SA v Vivendi Holdings 1 Corpn; Law Debenture Trust Corpn plc v Vivendi Holdings 1 Corpn*[2008] EWCA Civ 1178, [2009] 2 All ER (Comm) 213; *Midgulf International Ltd v Groupe Chimiche Tunisien* [2009] EWHC 963 (Comm), [2009] 2 Lloyd's Rep 411, [2009] All ER (D) 115 (May); and *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC*[2010] EWHC 772 (Comm), [2010] All ER (D) 163 (Apr).

NOTE 5--Concern as to the fairness of the foreign trial or the enforceability of the judgment in the event that the trial is unfair are not grounds for granting an injunction: *Al-Bassam v Al-Bassam*[2004] EWCA Civ 857, (2004) Times, 22 July.

NOTE 6--See *Masri v Consolidated Contractors International Co SAL*[2008] EWCA Civ 625, [2008] 2 All ER (Comm) 1146.

NOTE 8--CPR Pt 6 substituted: SI 2008/2178. *Aggeliki*, cited, applied in *West Tankers Inc v Ras Riunione Adriatica di Sicurta SpA, The Front Comor*[2005] EWHC 454 (Comm), [2005] 2 All ER (Comm) 240 (see also PARA 144; and Case C-185/07 *West Tankers Inc v Allianz SpA (formerly Ras Riunione Adriatica di Sicurta SpA)*[2009] 1 AC 1138, [2009] All ER (D) 82 (Feb), ECJ). See also *Samengo-Turner v J & H Marsh & McLennan (Services) Ltd*[2007] EWCA Civ 723, [2007] 2 All ER (Comm) 813; *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397, [2010] 1 Lloyd's Rep 193, [2009]

All ER (D) 179 (Dec); and *Midgulf International Ltd v Groupe Chimique Tunisien*[2010] EWCA Civ 66, [2010] All ER (D) 114 (Feb).

Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

NOTE 9--See *Seismic Shipping Inc v Total E&P UK plc, The 'Western Regent'*[2005] EWCA Civ 985, [2005] 2 All ER (Comm) 515 (not inequitable to commence proceedings in Texas for damages greater than amount specified by limitation decree in England).

NOTE 11--See *Deutsche Bank AG v Highland Crusader Offshore Partners LP*[2009] EWCA Civ 725, [2009] 2 All ER (Comm) 987 (commencement of parallel proceedings in another jurisdiction not oppressive or vexatious as right to do so not limited by non-exclusive jurisdiction clause).

NOTE 12--See *Shashoua v Sharma*[2009] EWHC 957 (Comm), [2009] 2 All ER (Comm) 477.

NOTE 14--See *OT Africa Line Ltd v Magic Sportswear Corpn*[2005] EWCA Civ 710, [2006] 1 All ER (Comm) 32 (anti-suit injunction based on exclusive jurisdiction clause granted notwithstanding fact that Canadian law sought to override agreement of parties); *UBS AG v NSH Nordbank AG*[2009] EWCA Civ 585, [2010] 1 All ER (Comm) 727.

The terms of EC Council Regulation 44/2001 art 2 (see PARA 65) cannot deprive competent parties of their autonomy to agree which court should have the jurisdiction to determine their disputes: *Winnetka Trading Corpn v Julius Baer International Ltd*[2008] EWHC 3146 (Ch), [2009] 2 All ER (Comm) 735.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/3. JURISDICTION/(6) INJUNCTION TO RESTRAIN FOREIGN PROCEEDINGS/(iii) Procedure/138. Interim procedural matters.

(iii) Procedure

138. Interim procedural matters.

Certain procedural matters, being of an interim character, are governed by the *lex fori*¹. For instance, the High Court may, by interim order made either unconditionally or on such terms and conditions as the court thinks just², grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so³, and the power of the High Court under this provision to grant an interim injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction, is exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction⁴.

The High Court also has power to grant interim relief⁵ where:

- 93 (1) proceedings have been or are to be commenced in a Brussels or Lugano contracting state⁶ or in a Regulation state⁷ other than the United Kingdom⁸ or in a part of the United Kingdom other than that in which the High Court in question exercises jurisdiction⁹; and
- 94 (2) they are or will be proceedings whose subject matter is within the scope of the 'Brussels I' Regulation¹⁰ whether or not that or any other convention has effect in relation to the proceedings¹¹.

Nevertheless, on an application for any interim relief under this provision¹² the court may refuse to grant that relief if, in its opinion, the fact that the court has no jurisdiction apart from this provision in relation to the subject matter of the proceedings in question makes it inexpedient for the court to grant it¹³.

Her Majesty may by Order in Council¹⁴ extend this power to grant interim relief so as to make it exercisable in relation to:

- 95 (a) proceedings commenced or to be commenced otherwise than in a Brussels or Lugano contracting state or Regulation state¹⁵; and
- 96 (b) proceedings whose subject matter is not within the scope of the Regulation¹⁶.

Such an Order in Council may:

- 97 (i) confer power to grant only specified descriptions of interim relief¹⁷;
- 98 (ii) make different provision for different classes of proceedings, for proceedings pending in different countries or courts outside the United Kingdom or in different parts of the United Kingdom, and for other different circumstances¹⁸; and
- 99 (iii) impose conditions or restrictions on the exercise of any power conferred by the Order¹⁹.

Where a defendant applies for security for his costs of the proceedings, and one of certain conditions obtains²⁰, then if, having regard to all the circumstances of the case, the court is

satisfied that it is just to do so, it may order the claimant to give such security for the defendant's costs as it thinks just²¹.

1 As to the lex fori see para 11 ante.

2 Supreme Court Act 1981 s 37(2).

3 Ibid s 37(1).

4 Ibid s 37(3).

5 In this provision, 'interim relief' means interim relief of any kind which the High Court has power to grant in proceedings relating to matters within its jurisdiction, other than: (1) a warrant for the arrest of property; or (2) provision for obtaining evidence: Civil Jurisdiction and Judgments Act 1982 s 25(7). As to the granting of interim relief see *Nippon Yusen Kaisha v Karageorgis* [1975] 3 All ER 282, [1975] 1 WLR 1093, CA; *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213n, [1975] 2 Lloyd's Rep 509, CA; *Babanaft International Co SA v Bassatne* [1990] Ch 13, [1989] 1 All ER 433, CA; *Republic of Haiti v Duvalier* [1990] 1 QB 202, [1989] 1 All ER 456; *Derby & Co Ltd v Weldon* [1990] Ch 48, [1989] 1 All ER 469, CA; *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] Ch 65, [1989] 1 All ER 1002, CA. The relief available is not restricted to remedies which would be available in the court trying the substantive dispute: *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, [1997] 3 All ER 673, CA (world-wide asset-freezing order (formerly called a 'Mareva injunction', following *Mareva Compania Naviera SA v International Bulkcarriers SA* supra) granted, although no similar relief is available in Swiss proceedings). As to the general principles which are to apply when the court is asked to grant an asset-freezing order ancillary to proceedings in a foreign jurisdiction pursuant to the Civil Jurisdiction and Judgments Act 1982 Act s 25 see *Ryan v Friction Dynamics Ltd* (2000) Times, 14 June; *Bank of China v NBM LLC* [2001] EWCA Civ 1933, [2002] 1 All ER 717, [2002] 1 WLR 844. See also CIVIL PROCEDURE vol 11 (2009) PARA 315.

6 For the meanings of 'Brussels contracting state' and 'Lugano contracting state' see para 65 notes 2 -3 ante.

7 For the meaning of 'Regulation state' see para 65 note 6 ante.

8 For the meaning of 'United Kingdom' see para 4 ante.

9 Civil Jurisdiction and Judgments Act 1982 s 25(1)(a) (s 25(1) amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt IV para 10(a)).

10 Ie the 'Brussels I' Regulation art 1: see para 74 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante.

11 Civil Jurisdiction and Judgments Act 1982 s 25(1)(b) (as amended: see note 9 supra).

12 Ie ibid s 25(1) (as amended). Where a claim for interim remedy is made under this provision, the claim form may be served out of the jurisdiction with the permission of the court: see CPR 6.20(4); and para 102 ante.

13 Civil Jurisdiction and Judgments Act 1982 s 25(2). The court should be cautious, so as to avoid conflict with orders of the court trying the substantive dispute: *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, [1997] 3 All ER 673, CA; *Refco Inc v Eastern Trading Co* [1999] 1 Lloyd's Rep 159; *State of Brunei Darussalam v Bolkiah* (2000) Times, 5 September. The court requires exceptional circumstances before it make an order under the Civil Jurisdiction and Judgments Act 1982 s 25 (as amended) which extends beyond its own territorial jurisdiction: *S & T Baurtrading v Nordling* [1997] 3 All ER 718, CA (worldwide asset-freezing order (formerly called a 'Mareva injunction': see note 5 supra)).

14 Any such Order in Council is subject to annulment in pursuance of a resolution of either House of Parliament: Civil Jurisdiction and Judgments Act 1982 s 25(6).

15 Ibid s 25(3)(a) (amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt IV para 10(b)). This power has been exercised: see the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997, SI 1997/302.

16 Civil Jurisdiction and Judgments Act 1982 s 25(3)(b) (substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt IV para 10(b)). This power has been exercised: see the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997, SI 1997/302. As to the scope of the 'Brussels I' Regulation see paras 72-74 ante. As to the power to take protective measures under the 'Brussels I' Regulation and the Brussels and Lugano Conventions see para 136 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

- 17 Civil Jurisdiction and Judgments Act 1982 s 25(4)(a).
- 18 Ibid s 25(4)(b).
- 19 Ibid s 25(4)(c).
- 20 Ie where it appears to the court that:
- 25 (1) that the claimant is an individual ordinarily resident out of the jurisdiction and is not a person against whom a claim can be enforced under the Brussels Conventions or the Lugano Convention or the Regulation, as defined by the Civil Jurisdiction and Judgments Act 1982 s 1(1) (see para 65 notes 1-3 ante) (CPR 25.13(2)(a)); or
 - 26 (2) the claimant is a company or other incorporated body which is ordinarily resident out of the jurisdiction, and is not a body against whom a claim can be enforced under the Brussels Conventions or the Lugano Convention or the Regulation (CPR 25.13(2)(b)); or
 - 27 (3) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so (CPR 25.13(2)(c)); or
 - 28 (4) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation (CPR 25.13(2)(d)); or
 - 29 (5) the claimant failed to give his address in the claim form, or gave an incorrect address in that form (CPR 25.13(2)(e)); or
 - 30 (6) the claimant (not being a claimant who is suing in a representative capacity) is acting as a nominal claimant, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so (CPR 25.13(2)(f)); or
 - 31 (7) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him (CPR 25.13(2)(g)).

As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. For the meaning of 'Great Britain' see para 4 ante.

21 CPR 25.13(1). See also Case C-398/92 *Firma Mund & Fester v Firma Hatrex International Transport* [1994] ECR I-467, ECJ; *Fitzgerald v Williams* [1996] QB 657, [1996] 2 All ER 171, CA; and CIVIL PROCEDURE Vol 11 (2009) PARAS 745-748.

UPDATE

138 Interim procedural matters

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

NOTE 6--See *Fourie v Le Roux* [2007] UKHL 1, [2007] 1 All ER 1087 (insolvency proceedings constituted by a compulsory winding-up order in a foreign court and the issue of a letter of request to the English High Court not 'proceedings' within the meaning of the 1982 Act s 25(1)).

NOTE 12--CPR Pt 6 substituted: SI 2008/2178.

NOTE 13--International arbitration proceedings are not 'proceedings' for the purpose of the Civil Jurisdiction and Judgments Act 1982 s 25 to enable the English court to grant interim relief to preserve the outcome of arbitration proceedings: *ETI Euro Telecom International NV v Republic of Bolivia* [2008] EWCA Civ 880, [2009] 2 All ER (Comm) 37.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(1) SCHEMES FOR ENFORCEMENT/139. Enforcement under statute and at common law.

4. FOREIGN AND UNITED KINGDOM JUDGMENTS

(1) SCHEMES FOR ENFORCEMENT

139. Enforcement under statute and at common law.

The procedural mechanism according to which a foreign judgment is given effect in England¹ will depend upon many different factors, such as the nationality of the court which gave judgment, the subject matter of the action, the date at which the proceedings were commenced or the judgment was handed down, and the nature of the order made by the foreign court. In short, it may be possible to bring an action at common law upon the foreign judgment², or to take advantage of the various statutory schemes which provide for the registration of the judgment³, and in particular for the registration of judgments from the Commonwealth⁴ and from the countries of western Europe. These alternatives are not, in general, mutually exclusive. The recognition and enforcement of United Kingdom judgments is governed by statute⁵.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See paras 140-161 post.

3 See para 166 et seq post.

4 As to the Commonwealth see COMMONWEALTH vol 13 (2009) PARA 701.

5 See paras 201-205 post. For the meaning of 'United Kingdom' see para 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/(i) Recognition and Enforcement of Foreign Judgments in Personam/140. Actions on foreign judgments.

(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON

(i) Recognition and Enforcement of Foreign Judgments in Personam

140. Actions on foreign judgments.

Subject to certain qualifications¹, a judgment in personam of a foreign court² of competent jurisdiction³ is capable of recognition and enforcement in England⁴. Apart from statute⁵, such a judgment will not be enforced directly by execution or any other process, but will be regarded, for procedural purposes, as creating a debt between the parties to it⁶, the debtor's liability arising on an implied promise to pay the amount of the foreign judgment⁷. The debt so created is a simple contract debt⁸ and not a specialty debt, and is subject to the appropriate limitation period⁹. It is immaterial that the debtor dies before judgment is given by the foreign court, and that the judgment is pronounced against his personal representative¹⁰.

1 See para 150 et seq post.

2 *Robinson v Bland* (1760) 2 Burr 1077 at 1083 (court of honour); *Gage v Bulkeley* (1744) 3 Atk 215 (political court); cf *Waldron v Coombe* (1810) 3 Taunt 162 (vice-consul's certificate as to sale of damaged goods); *Price v Dewhurst* (1837) 8 Sim 279 (on appeal (1838) 4 My & Cr 76) (executors' court); *Berliner Industriebank AG v Jost* [1971] 2 QB 463, [1971] 1 All ER 1513, CA (ascertainment of debt in bankruptcy proceedings). As to the recognition and enforcement of foreign arbitration awards see ARBITRATION vol 2 (2008) PARA 1288.

3 See paras 142-149 post.

4 See the text and notes 5-10 infra. A foreign judgment must be recognised by the English court if it is to be enforced in England. As to the conditions of recognition see paras 142-154 post. There may be recognition without enforcement of a foreign judgment in personam, eg where it is relied upon as a defence to an action brought in England (as to which see paras 160-161 post). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

5 See para 166 et seq post.

6 *Walker v Witter* (1778) 1 Doug KB 1; *Russell v Smyth* (1842) 9 M & W 810; *Williams v Jones* (1845) 13 M & W 628 at 633-634; *Godard v Gray* (1870) LR 6 QB 139 at 148-150; *Schibsby v Westenholz* (1870) LR 6 QB 155 at 159; *Grant v Easton* (1883) 13 QBD 302, CA.

7 *Grant v Easton* (1883) 13 QBD 302 at 303, CA. The claimant in England must be the successful party abroad or his assignee: *Barber v Mexican Land and Colonisation Co Ltd* (1899) 16 TLR 127; cf *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, [1966] 2 All ER 536, HL.

8 *Dupleix v De Roven* (1705) 2 Vern 540; *Grant v Easton* (1883) 13 QBD 302, CA.

9 *Re Flynn (No 2)*, *Flynn v Flynn* [1969] 2 Ch 403, [1969] 2 All ER 557; *Berliner Industriebank AG v Jost* [1971] 2 QB 463, [1971] 2 All ER 1513, CA; cf *Bouchet v Simmons* (1895) 11 TLR 227, CA. The appropriate period is six years: see the Limitation Act 1980 s 24(1); and LIMITATION PERIODS vol 68 (2008) PARA 1010.

10 *Re Flynn (No 2)*, *Flynn v Flynn* [1969] 2 Ch 403, [1969] 2 All ER 557.

UPDATE

140 Actions on foreign judgments

NOTE 4--See also *Philips v Avena*(2005) Times, 22 November.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/(i) Recognition and Enforcement of Foreign Judgments in Personam/141. Judgment barring proceedings on the underlying cause of action.

141. Judgment barring proceedings on the underlying cause of action.

No proceedings may be brought¹ by a person in England² on a cause of action³ on which judgment has been given in his favour in proceedings between the same parties or their privies⁴ in a court in another part of the United Kingdom⁵ or in a court of an overseas country⁶ unless the judgment is not enforceable⁷ or entitled to recognition in England⁸. This statutory provision does not provide, in terms, that the underlying cause of action merges in the foreign judgment, and it is not therefore subject to the technical aspects of the law of merger⁹. The barring of the cause of action is to be seen as a matter of procedure, and it may therefore be lifted or set aside by the court in circumstances in which it would be inequitable or unjust to deprive a party of the right to sue on the underlying claim¹⁰.

1 As to the commencement of proceedings generally see CIVIL PROCEDURE VOL 11 (2009) PARA 116 et seq.

2 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 As to whether the causes of action are the same see *Black v Yates* [1992] QB 526, [1991] 4 All ER 722; *Republic of India v India SS Co Ltd, The Indian Endurance* [1993] AC 410, [1993] 1 All ER 998, HL; *Republic of India v India SS Co Ltd (Indian Endurance and Indian Grace) (No 2)* [1998] AC 878, [1997] 4 All ER 380, HL.

4 As to who is privy to the judgment see *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, [1966] 2 All ER 536, HL; *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241, [1990] 2 All ER 990, CA; *Republic of India v India SS Co Ltd (Indian Endurance and Indian Grace) (No 2)* [1998] AC 878, [1997] 4 All ER 380, HL (the owner of a vessel served in an Admiralty action in rem is the same person as would be liable in an action in personam, so the action in personam against him is barred).

5 For the meaning of 'United Kingdom' see para 4 ante; and for the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

6 'Overseas country' means any country or territory outside the United Kingdom: Civil Jurisdiction and Judgments Act 1982 s 50.

7 ie whether by action at common law or by registration under the appropriate statutory scheme.

8 Civil Jurisdiction and Judgments Act 1982 s 34. This alters the rule of the common law, which provided that there was no merger of the cause of action in the judgment, although it was possible that an estoppel might bar further proceedings in respect of the same cause of action: see *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, [1966] 2 All ER 536, HL. Although the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 6 provides that no action may be brought on a foreign judgment which is registrable under Pt I (ss 1-7) (as amended), it is not provided in that Act that no action can be brought on the underlying cause of action. The Civil Jurisdiction and Judgments Act 1982 s 34 now applies to such a judgment. The judgment of an English court of record extinguishes the original cause of action: *King v Hoare* (1844) 13 M & W 494 at 504; and see CIVIL PROCEDURE VOL 12 (2009) PARA 1155.

9 See *Republic of India v India SS Co Ltd, The Indian Endurance* [1993] AC 410, [1993] 1 All ER 998, HL.

10 Eg by reason of estoppel or waiver: *Republic of India v India SS Co Ltd, The Indian Endurance* [1993] AC 410, [1993] 1 All ER 998, HL; and see *Republic of India v India SS Co Ltd (Indian Endurance and Indian Grace) (No 2)* [1998] AC 878, [1997] 4 All ER 380, HL (the defendants were not estopped by convention or acquiescence from relying on the Civil Jurisdiction and Judgments Act 1982 s 34).

UPDATE

141 Judgment barring proceedings on the underlying cause of action

NOTE 8--See also *Karafarin Bank v Mansoury-Dara* [2009] EWHC 1217 (Comm), [2009] 2 Lloyd's Rep 289, [2009] All ER (D) 28 (Jun).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/ (ii) International Jurisdictional Competence of the Foreign Court/142. In general.

(ii) International Jurisdictional Competence of the Foreign Court

142. In general.

It is a precondition to the recognition or enforcement in England¹ of a foreign judgment in personam that the foreign court should have had international jurisdiction according to English conflict of laws rules².

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Buchanan v Rucker* (1808) 9 East 192 at 194; *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670 at 683-684, PC; and see paras 143-148 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/ (ii) International Jurisdictional Competence of the Foreign Court/143. Presence of defendant in foreign country.

143. Presence of defendant in foreign country.

A foreign court has jurisdiction to pronounce a judgment in personam which is capable of recognition and enforcement in England¹ if, at the date of the commencement of the proceedings², the defendant was present³ in the country⁴ of the foreign court.

Where the defendant is a corporation, the foreign court will probably be treated as having jurisdiction over the corporation only if either:

- 100 (1) it has established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in the foreign country, and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents; or
- 101 (2) a representative of the corporation has for more than a minimal period of time been carrying on the corporation's business in the other country at or from some fixed place of business.

In either case, presence can only be established if it can fairly be said that the corporation's business (whether or not together with the representative's own business) has been transacted at or from the fixed place of business⁵. This is likely to be the case only where the local agent or representative has authority to enter into contracts on behalf of the corporation without submitting them to the corporation for approval⁶. It is not permissible to argue that a corporation is present merely because it is part of a larger economic grouping, another member of which is present within the jurisdiction of the foreign court⁷.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 This probably means the date of service of process on him: *Adams v Cape Industries plc* [1990] Ch 433 at 518, [1991] 1 All ER 929 at 1003, CA. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 *Adams v Cape Industries plc* [1990] Ch 433, [1991] 1 All ER 929, CA; and see *Carrick v Hancock* (1895) 12 TLR 59. The reasoning was said in *Adams v Cape Industries plc* supra to follow from the fact that the defendant, when present, is liable to observe the summons to court of the local sovereign. It is unclear whether a defendant who was resident but not present at the particular date within the foreign country is similarly liable: *Adams v Cape Industries plc* supra (although if he elects to appear in the proceedings he will submit, and the point will become academic). See also *Emanuel v Symon* [1908] 1 KB 302 at 309, CA; *Rousillon v Rousillon* (1880) 14 ChD 351 at 371; *Schibsby v Westenholz* (1870) LR 6 QB 155 at 161; cf the Administration of Justice Act 1920 s 9(2)(b) (as to which see para 167 post); and the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(2)(a)(iv) (as to which see para 177 post).

4 In a country where there are federal and state courts, it is probably sufficient that a defendant is present somewhere within the federation if sued in a federal court, but he must be within the state if sued in a state court: *Adams v Cape Industries plc* [1990] Ch 433 at 550-557, [1991] 1 All ER 929 at 1031-1042, CA.

5 *Adams v Cape Industries plc* [1990] Ch 433 at 530-531, [1991] 1 All ER 929 at 1014-1015, CA. See also *Littauer Glove Corp v FW Millington (1920) Ltd* (1928) 44 TLR 746; *Sfeir & Co v National Insurance Co of New Zealand Ltd* [1964] 1 Lloyd's Rep 330 (in which registration was sought under the Administration of Justice Act 1920); *Vogel v R and A Kohnstamm Ltd* [1973] QB 133, [1971] 2 All ER 1428. Assistance is to be derived from those cases in which the English court has said that process may be served on foreign companies on the footing that such foreign companies are in England: see eg *Okura & Co Ltd v Forsbacka Jernverks Aktiebolag* [1914] 1 KB 715, CA (Swedish company not in England by virtue of working through, but not by, an English agent);

Adams v Cape Industries plc supra at 528 and 1012. See para 472 post. Cf the Administration of Justice Act 1920 s 9(2)(b) (as to which see para 167 post); and the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(2)(a)(iv) (as to which see para 177 post).

6 *F & K Jabbour v Custodian of Israeli Absentee Property* [1954] 1 All ER 145, [1954] 1 WLR 139. It is not clear whether compliance with this condition will be required if the corporation is a non-trading corporation: see *Adams v Cape Industries plc* [1990] Ch 433 at 524, [1991] 1 All ER 929 at 1009, CA.

7 See *Adams v Cape Industries plc* [1990] Ch 433 at 532-539, [1991] 1 All ER 929 at 1016-1022, CA.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/ (ii) International Jurisdictional Competence of the Foreign Court/144. Actual submission.

144. Actual submission.

A foreign court has jurisdiction to pronounce a judgment in personam capable of recognition and enforcement in England if the defendant submitted or agreed to submit to the jurisdiction of the foreign court¹.

There is clearly submission where the defendant, in his character as claimant in the foreign action, himself selected the forum where the judgment was given against him, whether this took the form of dismissal of his claim² or of judgment against him in respect of a counterclaim, cross-action or costs³.

The defendant may also be held to have submitted where he voluntarily appeared in the foreign action⁴. But if the purpose of the appearance was any or all of the following, namely:

- 102 (1) to contest the jurisdiction of the court;
- 103 (2) to seek dismissal or a stay of proceedings on the ground that the dispute should be submitted to arbitration or to the determination of the courts of another country; or
- 104 (3) to protect or obtain the release of property seized or threatened with seizure, then the appearance will not amount to a submission⁵.

It appears that it is the purpose of the appearance, rather than the form which it actually took, which is the determining factor, and if the defendant was in effect constrained by local procedure to enter a defence on the merits at the same time as the challenge to the jurisdiction, he will be entitled to argue that he did not submit. But if the entry of a defence on the merits was not required at the same time as the challenge to the jurisdiction, it is open to a court to conclude that, by entering it, he did submit to the jurisdiction of the foreign court⁶.

1 *Emanuel v Symon* [1908] 1 KB 302 at 309, CA. Cf the Administration of Justice Act 1920 s 9(2)(b) (as to which see para 167 post); and the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(2)(a)(i)-(iii) (as amended) (as to which see para 177 post); and see the cases cited in notes 3-6 infra. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See para 161 post.

3 *Schibsby v Westenholz* (1870) LR 6 QB 155 at 161, citing *General Steam Navigation Co v Guillou* (1843) 11 M & W 877 at 894; *Emanuel v Symon* [1908] 1 KB 302 at 309, CA; cf *Novelli v Rossi* (1831) 2 B & Ad 757. See also the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(2)(a)(ii); and para 177 post.

4 *De Cosse Brissac v Rathbone* (1861) 6 H & N 301 (as explained in *Schibsby v Westenholz* (1870) LR 6 QB 155 at 162); *Rousillon v Rousillon* (1880) 14 ChD 351 at 371; *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670 at 683-684, PC; *Emanuel v Symon* [1908] 1 KB 302, CA; *Harris v Taylor* [1915] 2 KB 580, CA (as explained in *Re Dulles' Settlement (No 2)*, *Dulles v Vidler* [1951] Ch 842 at 851, [1951] 2 All ER 69 at 72-73, CA). The same principle will apply where the defendant suffers judgment in default of appearance, but then appeals on the merits of the case: *SA Consortium General Textiles v Sun & Sand Agencies Ltd* [1978] QB 279, [1978] 2 All ER 339, CA. It may be otherwise if the application is confined to an attempt to have the judgment set aside purely on jurisdictional grounds: *SA Consortium General Textiles v Sun & Sand Agencies Ltd* supra.

Whether the defendant has appeared voluntarily must be judged according to the standards of both the foreign court and the English court: *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847 at 862, CA.

5 See the Civil Jurisdiction and Judgments Act 1982 s 33(1), reversing the principle in *Henry v Geopresco International Ltd* [1976] QB 726, [1975] 2 All ER 702, CA. Cf Case 150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] ECR 1671, [1982] 3 CMLR 1, ECJ (a case on the Brussels Convention art 18 (as to which see para 78 ante)); *Marc Rich & Co AG v Società Italiana Impianti PA, The Atlantic Emperor (No 2)* [1992] 1 Lloyd's Rep 624, CA.

6 *Marc Rich & Co AG v Società Italiana Impianti PA, The Atlantic Emperor (No 2)* [1992] 1 Lloyd's Rep 624, CA; cf *Ngcobo v Thor Chemicals Holdings Ltd* (1995) Times, 10 November, CA (service of defence as waiver of challenge to jurisdiction of English court).

UPDATE

144 Actual submission

NOTE 6--See also Case C-185/07 *West Tankers Inc v Allianz SpA (formerly Ras Riunione Adriatica di Sicurta SpA)* [2009] 1 AC 1138, [2009] 1 All ER (Comm) 435, ECJ.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/ (ii) International Jurisdictional Competence of the Foreign Court/145.

Agreement to submit.

145. Agreement to submit.

The jurisdiction of a foreign court will be recognised where the defendant has agreed to submit to its jurisdiction, in particular where he is a party to a contract which provides that all disputes between the parties are to be referred to the exclusive, or to the non-exclusive, jurisdiction of that court¹. The foreign court similarly has jurisdiction where the defendant has agreed to accept service of process in the foreign country². Thus, where the defendant has taken shares in a foreign company whose articles of association or statutes provide that all disputes are to be submitted to the jurisdiction of a foreign court and that every shareholder must elect a domicile at a particular place for service of process, and declare his domicile to be in a certain place in default of such election, then in the event of such default he is deemed to have agreed to submit to the jurisdiction of the court where that place is situated³.

The defendant is similarly bound by a statute enacted in the country where the company is incorporated which makes specific provision for service of process on the particular company and for execution of judgment against its members⁴, but, as only a clear agreement to submit can give the foreign court jurisdiction, a mere general provision in the foreign law that the shareholder is deemed to have elected a domicile in the foreign country is insufficient to found jurisdiction⁵.

A defendant who submits to the jurisdiction of a foreign court in a claim properly brought against him is regarded as having submitted to its jurisdiction not only in respect of other claims arising out of the same subject matter but also claims which are related to or connected with the original claim⁶.

1 *Feyerick v Hubbard* (1902) 71 LJB 509; *Jeannot v Fuerst* (1909) 100 LT 816. As to the English court's power to stay proceedings brought in England in breach of such an agreement (or its duty to dismiss those brought in violation of a clause validated by the 'Brussels I' Regulation or the Brussels or Lugano Convention) see paras 79, 132 ante. Whether the agreement was one which encompassed the actual claim brought is a matter of construction for the English court (as to which see para 365 post). As to the meanings of 'England', 'English' and 'English law' see para 4 ante. As to the 'Brussels I' Regulation see para 65 text and note 1 post. As to the Brussels Convention see para 65 text and note 2 post. As to the Lugano Convention see para 65 text and note 3 post.

2 *Copin v Adamson* (1874) LR 9 Exch 345 (affd (1875) 1 ExD 17, CA); *Emanuel v Symon* [1908] 1 KB 302 at 308-309, 314, CA; cf *Vallée v Dumergue* (1849) 4 Exch 290.

3 *Copin v Adamson* (1874) LR 9 Exch 345 (affd (1875) 1 ExD 17, CA); *Emanuel v Symon* [1908] 1 KB 302 at 308-309, 314, CA; cf *Vallée v Dumergue* (1849) 4 Exch 290.

4 *Bank of Australasia v Harding* (1850) 9 CB 661; *Bank of Australasia v Nias* (1851) 16 QB 717; *Kelsall v Marshall* (1856) 1 CBNS 241.

5 *Meeus v Thellusson* (1853) 8 Exch 638; *Copin v Adamson* (1874) LR 9 Exch 345 (the second replication; on appeal (1875) 1 ExD 17 at 19, CA, the point was reserved); *Emanuel v Symon* [1908] 1 KB 302 at 308-309, CA.

6 *Murthy v Sivajothi* [1999] 1 All ER 721, [1999] 1 WLR 467, CA.

UPDATE

145 Agreement to submit

NOTE 6--*Murthy*, cited, applied: *Whyte v Whyte* [2005] EWCA Civ 858, [2005] 3 FCR 21.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/ (ii) International Jurisdictional Competence of the Foreign Court/146. Agreement to submit not to be implied.

146. Agreement to submit not to be implied.

It has been said that an agreement to submit to the jurisdiction of a foreign court will not be implied by the English court¹. Thus it has refused to imply such an agreement from an agreement that a contract is to be governed by the law of a foreign country², or from the fact that the defendant was a member of a partnership firm which carried on business in the foreign country³, or from the fact that the cause of action arose in the foreign country at a time when the defendant was present there⁴. Nevertheless, the proper interpretation of these cases may be that the court was unwilling to make the implication in the particular case, as distinct from a broader holding that it was generally impossible to imply an agreement to submit⁵.

1 *Vogel v R and A Kohnstamm Ltd* [1973] QB 133 at 144-147, [1971] 2 All ER 1428 at 1438-1440, citing *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670 at 686, PC, and *Emanuel v Symon* [1908] 1 KB 302 at 305, 313-314, CA; not following *Blohn v Dessler* [1962] 2 QB 116, [1961] 3 All ER 1; and distinguishing *Sfeir & Co v National Insurance Co of New Zealand Ltd* [1964] 1 Lloyd's Rep 330 (agreement may be an implied one). See also *New Hampshire Insurance Co v Strabag Bau AG* [1992] 1 Lloyd's Rep 361, CA. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Dunbee Ltd v Gilman & Co (Australia) Pty Ltd* [1968] 2 Lloyd's Rep 394, NSW CA.

3 *Emanuel v Symon* [1908] 1 KB 302, CA; contra *Blohn v Dessler* [1962] 2 QB 116, [1961] 3 All ER 1 (not followed in *Vogel v R and A Kohnstamm Ltd* [1973] QB 133, [1971] 2 All ER 1428).

4 *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670, PC; *Emanuel v Symon* [1908] 1 KB 302, CA.

5 Cf *Adams v Cape Industries plc* [1990] Ch 433 at 465-466, [1991] 1 All ER 929 at 954-955 (affd on other grounds at [1990] Ch 503, [1991] 1 All ER 987, CA); but see also *New Hampshire Insurance Co v Strabag Bau AG* [1992] 1 Lloyd's Rep 361, CA.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/ (ii) International Jurisdictional Competence of the Foreign Court/147. Lack of international jurisdiction by reason of choice of court or arbitration clause.

147. Lack of international jurisdiction by reason of choice of court or arbitration clause.

Although the conflict of laws rules may lead to the provisional conclusion that a court did have international jurisdiction¹, a judgment given by a court of an overseas country² must not be recognised or enforced in the United Kingdom³ if the proceedings were brought contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country⁴. But if the defendant agreed to the bringing of the proceedings in that court, or if he counterclaimed in the proceedings or otherwise submitted to the jurisdiction of the court, he will lose the protection of this provision⁵. The United Kingdom court is not bound by any decision of the overseas court on the matter⁶.

1 See paras 142-146 ante.

2 For the meaning of 'overseas country' see para 141 note 6 ante.

3 For the meaning of 'United Kingdom' see para 4 ante.

4 Civil Jurisdiction and Judgments Act 1982 s 32(1)(a). Both a choice of court agreement and an arbitration agreement would fall within the ambit of this provision. Section 32(1) does not apply where the agreement was illegal, void or unenforceable or incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which the judgment was given: s 32(2).

5 Ibid s 32(1)(b), (c); *Marc Rich & Co AG v Società Italiana Impianti PA (No 2)* [1992] 1 Lloyd's Rep 624, CA.

6 Civil Jurisdiction and Judgments Act 1982 s 32(3), which also applies in relation to decisions of the foreign court on matters mentioned in s 32(2) (see note 4 supra). See also *Tracomin SA v Sudan Oil Seeds Co Ltd* [1983] 1 All ER 404, [1983] 1 WLR 662; affd [1983] 3 All ER 137, [1983] 1 WLR 1026, CA.

UPDATE

147 Lack of international jurisdiction by reason of choice of court or arbitration clause

NOTE 5--See also *C v D* [2007] EWCA Civ 1282, [2008] 1 All ER (Comm) 1001.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/ (ii) International Jurisdictional Competence of the Foreign Court/148. Other possible bases of international jurisdiction.

148. Other possible bases of international jurisdiction.

Notwithstanding dicta in several cases to the effect that the courts of a foreign country have jurisdiction over a national of that country¹, it is doubtful whether this is sufficient by itself to give a foreign court jurisdiction².

Certain dicta also suggest that the courts of a foreign country have jurisdiction over a person domiciled in that country³, but it has not yet been clearly held that this is a sufficient basis of jurisdiction⁴.

The mere fact that a foreign court has assumed jurisdiction in circumstances in which, *mutatis mutandis*, the English court would have assumed jurisdiction⁵ is insufficient to give the foreign court jurisdiction for the purpose of recognition or enforcement of a foreign judgment in *personam*⁶.

The possession by the defendant of property, whether movable or immovable, in the country of the foreign court is an insufficient basis of jurisdiction⁷. The mere fact that the defendant was present in the foreign country at the time when the cause of action arose is also insufficient to give the foreign court jurisdiction⁸.

It has been held that a judgment in *personam* which is ancillary to a divorce decree pronounced in a country forming part of the Commonwealth may be enforced in England even though, at the date of the commencement of the proceedings, the defendant was neither resident nor present in the country where the decree was pronounced and did not submit to the jurisdiction⁹.

1 *Douglas v Forrest* (1828) 4 Bing 686; *General Steam Navigation Co v Guillo* (1843) 11 M & W 877 at 894; *Schibsby v Westenholz* (1870) LR 6 QB 155 at 161; *Rousillon v Rousillon* (1880) 14 ChD 351 at 371; *Emanuel v Symon* [1908] 1 KB 302 at 309, CA; *Gavin Gibson & Co Ltd v Gibson* [1913] 3 KB 379 at 388; *Harris v Taylor* [1915] 2 KB 580 at 591, CA; *Forsyth v Forsyth* [1948] P 125 at 132, [1947] 2 All ER 623 at 624, CA; cf *Société Cooperative Sidmetal v Titan International Ltd* [1966] 1 QB 828 at 843, [1965] 3 All ER 494 at 501.

2 *Blohn v Desser* [1962] 2 QB 116 at 123, [1961] 3 All ER 1 at 4; *Rossano v Manufacturers' Life Insurance Co* [1963] 2 QB 352 at 382-383, [1962] 2 All ER 214 at 232; *Vogel v R and A Kohnstamm Ltd* [1973] QB 133 at 141, [1971] 2 All ER 1428 at 1435; *Rainford v Newell-Roberts* [1962] IR 95.

3 *Turnbull v Walker* (1892) 67 LT 767 at 769; *Emanuel v Symon* [1908] 1 KB 302 at 308, 314, CA; *Jaffir v Williams* (1908) 25 TLR 12 at 13; *Gavin Gibson & Co Ltd v Gibson* [1913] 3 KB 379 at 385.

4 See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 500-501.

5 *Travers v Holley* [1953] P 246, [1953] 2 All ER 794, CA (recognition of foreign divorce decree). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

6 *Schibsby v Westenholz* (1870) LR 6 QB 155 at 159; *Turnbull v Walker* (1892) 67 LT 767; *Re Trepca Mines Ltd* [1960] 1 WLR 1273 at 1280-1282, CA (not following on this point *Re Dulles' Settlement (No 2)*, *Dulles v Vidler* [1951] Ch 842 at 851, [1951] 2 All ER 69 at 73, CA); *Société Cooperative Sidmetal v Titan International Ltd* [1966] 1 QB 828, [1965] 3 All ER 494. But the Supreme Court of Canada has held, in effect, that this is a sufficient basis for the recognition of a judgment at common law, and the question may therefore be open to re-examination in an English court in an appropriate case: see *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077.

7 *Emanuel v Symon* [1908] 1 KB 302, CA; cf *Schibsby v Westenholz* (1870) LR 6 QB 155 at 163; *Rousillon v Rousillon* (1880) 14 ChD 351 at 371; *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670 at 685, PC,

disapproving on this point *Becquet v MacCarthy* (1831) 2 B & Ad 951. See also Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 508-512.

8 *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670, PC, disapproving on this point *Schibsby v Westenholz* (1870) LR 6 QB 155 at 163; but cf *Morguard Investments Ltd v De Savoye* [1990] SCR 1077, Can SC.

9 *Phillips v Batho* [1913] 3 KB 25. However, this is questionable: the reasoning in this case was undermined by the decision in *Jacobs v Jacobs and Ceen* [1950] P 146, [1950] 1 All ER 96, and the decision was not followed in *Redhead v Redhead and Crothers* [1926] NZLR 131 (costs). For criticism of *Phillips v Batho* supra see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 503-504. As to the Commonwealth see COMMONWEALTH vol 13 (2009) PARA 701.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/ (ii) International Jurisdictional Competence of the Foreign Court/149. International jurisdiction, but lack of internal competence.

149. International jurisdiction, but lack of internal competence.

Provided that the foreign court had jurisdiction to pronounce a judgment in personam according to the English conflict of laws rules¹, it is probably immaterial to the recognition or enforcement of the foreign judgment in England that the court lacked competence by the law of its own country². If, however, the evidence is that the foreign judgment is not merely voidable or irregular according to the law under which it was pronounced (and therefore valid until such time as further proceedings are brought to annul it or have it set aside), but rather is a complete nullity, it is probable that it will not be recognised in England³.

1 See paras 142-148 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Vanquelin v Bouard* (1863) 15 CBNS 341; approved in *Pemberton v Hughes* [1899] 1 Ch 781 at 791, CA.

3 Cf *SA Consortium General Textiles v Sun & Sand Agencies Ltd* [1978] QB 279, [1978] 2 All ER 339, CA; and the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 2(1) proviso (b) (see para 173 post).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/(iii) Conclusiveness of Foreign Judgments in Personam/150. Foreign judgment generally conclusive.

(iii) Conclusiveness of Foreign Judgments in Personam

150. Foreign judgment generally conclusive.

Subject to certain exceptions¹, a judgment in personam of a foreign court of competent jurisdiction² which is final and conclusive³ on the merits⁴ is conclusive in England between parties and privies as to any issue upon which it adjudicates⁵. It is not impeachable or examinable on the merits, whether for error of fact⁶ or of law⁷.

It has, however, been held that a foreign judgment will not be recognised if it shows on its face a perverse and deliberate refusal to apply generally accepted doctrines of private international law⁸. In the interests of international comity English courts will recognise the validity of the decisions of foreign arbitration tribunals whose competence is derived from international law or practice⁹.

Although every presumption is to be made in favour of a foreign judgment, and the burden of proof lies on the party who seeks to impeach it¹⁰, such a judgment may be impeached on the ground that it was obtained by fraud¹¹, or that its recognition or enforcement would be contrary to public policy¹², or that it was obtained in proceedings which were contrary to natural or substantial justice¹³.

Where there are two competing foreign judgments, each of which is pronounced by a court of competent jurisdiction, both being final and not open to challenge, the earlier in time will prevail¹⁴.

1 See paras 151-153 post.

2 See paras 142-149 ante.

3 As to what is final and conclusive see para 158 post.

4 A foreign action may be taken as having been heard and decided on the merits if the foreign court held that it had jurisdiction to adjudicate on an issue raised in the cause of action to which the particular set of facts gave rise and its judgment on that cause of action could not be varied, reopened or set aside by that court or by any other court of co-ordinate jurisdiction, notwithstanding that it might be subject to appeal to a court of higher jurisdiction: see *DSV Silo-und Verwaltungsgesellschaft mbH v Sennar (Owners), The Sennar* [1985] 2 All ER 104, [1985] 1 WLR 490, HL.

5 *Godard v Gray* (1870) LR 6 QB 139; *Henderson v Henderson* (1844) 6 QB 288; *Ricardo v Garcias* (1845) 12 Cl & Fin 368, HL; *Bank of Australasia v Harding* (1850) 9 CB 661; *Bank of Australasia v Nias* (1851) 16 QB 717; *Cammell v Sewell* (1858) 3 H & N 617 at 647; *De Cosse Brissac v Rathbone* (1861) 6 H & N 301; *Scott v Pilkington* (1862) 2 B & S 11; *Vanquelin v Bouard* (1863) 15 CBNS 341; *Ellis v M'Henry* (1871) LR 6 CP 228 at 238-239; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 917-918, 925-927, 966-967, [1966] 2 All ER 536 at 555, 560, 584-585, HL; *Vervaeke (formerly Messina) v Smith* [1983] 1 AC 145, [1982] 2 All ER 144, HL; *Tracom SA v Sudan Oil Seeds Co Ltd* [1983] 1 All ER 404, [1983] 1 WLR 662 (affd [1983] 3 All ER 137, [1983] 1 WLR 1026, CA); *DSV Silo-und Verwaltungsgesellschaft mbH v Sennar (Owners), The Sennar* [1985] 2 All ER 104, [1985] 1 WLR 490, HL; *ED & F Man (Sugar) Ltd v Yani Haryanto (No 2)* [1991] 1 Lloyd's Rep 429, CA; *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241, [1990] 2 All ER 990, CA; *Black v Yates* [1992] QB 526, [1991] 4 All ER 772. The doctrine of issue estoppel is to be applied to foreign judgments with caution: *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* supra at 918, 925-926, 967 and 555, 560, 585. Cf the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 8; and see generally CIVIL PROCEDURE vol 12 (2009) PARA 1168 et seq. Even if there is not the basis for an estoppel, it may be an abuse of the process of the court for the matter

to be relitigated: *House of Spring Gardens Ltd v Waite* supra; *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 WLR 44, PC. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

6 *Henderson v Henderson* (1844) 6 QB 288; *De Cosse Brissac v Rathbone* (1861) 6 H & N 301 (the third plea). It seems that the discovery of fresh evidence after the date of the foreign judgment is immaterial: *De Cosse Brissac v Rathbone* supra (the fifth plea), but this is questionable: see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 515.

7 *Godard v Gray* (1870) LR 6 QB 139; *Scott v Pilkington* (1862) 2 B & S 11; *De Cosse Brissac v Rathbone* (1861) 6 H & N 301 (the third plea). It is immaterial that the judgment was a default judgment: *Russell v Smyth* (1842) 9 M & W 810.

8 *Simpson v Fogo* (1863) 1 Hem & M 195 (judgment in rem) (as explained in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 922, [1966] 2 All ER 536 at 557-558, HL). However, the decision in *Simpson v Fogo* supra has been doubted: see *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532 at 558, CA; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* supra at 917-918, 922, 978 and 555, 557, 592; and see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 513. Cf *Banco Atlantico SA v British Bank of the Middle East* [1990] 2 Lloyd's Rep 504, CA.

9 *Dallal v Bank Mellat* [1986] QB 441, [1986] 1 All ER 239.

10 *Alivon v Furnival* (1834) 1 Cr M & R 277; *Robertson v Struth* (1844) 5 QB 941; *Henderson v Henderson* (1844) 6 QB 288; *Bank of Australasia v Nias* (1851) 16 QB 717; *Taylor v Ford* (1873) 29 LT 392.

11 See para 151 post.

12 See para 152 post.

13 See para 153 post.

14 *Showlag v Mansour* [1995] 1 AC 431, [1994] 2 All ER 129, PC.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/(iii) Conclusiveness of Foreign Judgments in Personam/151. Judgment obtained by fraud.

151. Judgment obtained by fraud.

A foreign judgment which has been obtained by fraud will not be recognised or enforced in England¹. The judgment is impeachable whether the fraud was on the part of the court² or on the part of the successful party³. It is immaterial that the fraud has already been investigated by the foreign court, although in such a case the plea of fraud may involve a retrial in England of the matters adjudicated upon by the foreign court⁴; and it is immaterial that the unsuccessful party in the foreign proceedings refrained from raising the plea of fraud in those proceedings although the facts were known to him at all material times⁵. If, however, the allegation of fraud has been made in fresh proceedings before the foreign court by way of an application to have the judgment set aside, the English court may hold the applicant to be estopped from challenging the judgment of the court which he elected to seise, or may find it to be an abuse of the process of the court for the allegation of fraud to be relitigated in England⁶.

1 *Ochsenbein v Papelier* (1873) 8 Ch App 695; *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295, CA; *Manger etc (Syndics under Bankruptcy of Rodrigues et Cie) v Cash* (1889) 5 TLR 271, DC; *Vadala v Lawes* (1890) 25 QBD 310, CA; *Ellerman Lines Ltd v Read* [1928] 2 KB 144, CA (judgment in rem); *Syal v Heyward* [1948] 2 KB 443, [1948] 2 All ER 576, CA (a case on the Foreign Judgments (Reciprocal Enforcement) Act 1933); *Jet Holdings Ltd v Patel* [1990] 1 QB 335, [1989] 2 All ER 648, CA; *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241, [1990] 2 All ER 990, CA; *Owens Bank Ltd v Bracco* [1992] 2 AC 443, [1992] 2 All ER 193, HL (a case under the Administration of Justice Act 1920, although the authority of this decision in relation to fraud at common law is not beyond argument: *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 WLR 44, PC). See also *Bowles v Orr* (1835) 1 Y & C Ex 464; *Bank of Australasia v Nias* (1851) 16 QB 717 at 735; *Cammell v Sewell* (1858) 3 H & N 617 at 646 (judgment in rem); *Godard v Gray* (1870) LR 6 QB 139 at 149; *Castrique v Imrie* (1870) LR 4 HL 414 at 433 (judgment in rem). Cf the Administration of Justice Act 1920 s 9(2)(d) (as to which see para 167 post); and the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(2)(a)(iv) (as to which see para 177 post). As to the rejection in Australia of English authorities see *Keele v Findley* (1990) 21 NSWLR 444, NSW SC. As to judgments obtained by fraud see generally *Duchess of Kingston's Case* (1776) 1 Leach 146, 2 Smith LC (13th Edn) 644, 717; and see CIVIL PROCEDURE vol 12 (2009) PARA 1024. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Price v Dewhurst* (1837) 8 Sim 279 (court interested in subject matter of dispute).

3 See the cases cited in note 1 supra.

4 *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295, CA; *Vadala v Lawes* (1890) 25 QBD 310, CA; *Jet Holdings Inc v Patel* [1990] 1 QB 335, [1989] 2 All ER 648, CA; *Owens Bank Ltd v Bracco* [1992] 2 AC 443, [1992] 2 All ER 193, HL (a case on the Administration of Justice Act 1920).

5 *Syal v Heyward* [1948] 2 KB 443, [1948] 2 All ER 576, CA (a case on the Foreign Judgments (Reciprocal Enforcement) Act 1933, applying *Vadala v Lawes* (1890) 25 QBD 310, CA); *Owens Bank Ltd v Bracco* [1992] 2 AC 443, [1992] 2 All ER 193, HL.

6 *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241, [1990] 2 All ER 990, CA; *Owens Bank Ltd v Etoile Commerciale SA* [1995] 1 WLR 44, PC.

UPDATE

151 Judgment obtained by fraud

NOTE 1--See *Korea National Insurance Corp'n v Allianz Global Corporate & Speciality* [2008] EWCA Civ 1355, [2009] Lloyd's Rep IR 480, [2008] All ER (D) 45 (Dec) (court not

precluded from investigating allegations of fraud by reason of potential embarrassment to diplomatic relations).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/(iii) Conclusiveness of Foreign Judgments in Personam/152. Judgment contrary to public policy.

152. Judgment contrary to public policy.

A foreign judgment will not be recognised or enforced in England if its recognition or, as the case may be, enforcement, would be contrary to public policy¹. It has been held that if the foreign court has itself considered the public policy issue in the course of the proceedings, or if public policy in the country of the foreign court is held to be substantially the same in relevant respects as that in England, the conclusion of the foreign court may bar the reopening of the issue in the English court².

It would be contrary to public policy to recognise a judgment which is irreconcilable with the prior decision of the English court in an action between the same parties or their privies³.

1 *Re Macartney, Mafarlane v Macartney* [1921] 1 Ch 522 (posthumous affiliation order not limited to the child's minority; the order was also held to be unenforceable on the ground that it was not final and conclusive), distinguished in *Phrantzes v Argenti* [1960] 2 QB 19 at 31-33, [1960] 1 All ER 778 at 781-782. Cf *Mayo-Perrott v Mayo-Perrott* [1958] IR 336; the Administration of Justice Act 1920 s 9(2)(f) (see para 167 post); and the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(1)(a)(v) (see para 176 post). As to what is final and conclusive see para 158 post. See also *Dalmia Dairy Industries v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223, CA (enforcement in England of an award arising out of agreement between nationals of states now at war but friendly to England not precluded). As to public policy generally see para 31 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Israel Discount Bank of New York v Hadjipateras* [1983] 3 All ER 129, [1984] 1 WLR 137, CA. It is not certain, however, that this will always be the case, as the foreign court will have made an assessment of its own public policy in relation to the underlying cause of action, as distinct from English public policy in relation to the enforcement: see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 531.

3 *Vervaeke (formerly Messina) v Smith* [1983] 1 AC 145, [1982] 2 All ER 144, HL; *ED & F Man (Sugar) Ltd v Haryanto (No 2)* [1991] 1 Lloyd's Rep 429, CA. If the judgments that conflict are both foreign and both satisfy the criteria for recognition, then, in the absence of estoppel, the earlier judgment prevails: *Showlag v Mansour* [1995] 1 AC 431, [1994] 2 All ER 129, PC.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/(iii) Conclusiveness of Foreign Judgments in Personam/153. Proceedings contrary to natural or substantial justice.

153. Proceedings contrary to natural or substantial justice.

A foreign judgment can be impeached if the proceedings in which the judgment was obtained were contrary to natural or substantial justice¹. Proceedings are not regarded as having been contrary to natural or substantial justice merely because the foreign court admitted evidence which was inadmissible under English law², or excluded evidence which was admissible under English law³, nor because of a mere procedural irregularity (or departure from the standards of corresponding English procedure) on the part of the foreign court⁴, provided that the unsuccessful party was given an opportunity to present his case⁵. The objection that the foreign proceedings were contrary to natural or substantial justice may be taken in England even though it could have been or was taken before the foreign court⁶.

At first sight, lack of notice of the foreign proceedings is not a ground on which objection can be taken in England to a foreign judgment if the defendant was resident in the foreign country at the date when the proceedings were commenced⁷, or if he voluntarily appeared in the proceedings⁸, at any rate if the law of the foreign country with regard to notice was complied with, as in those circumstances it may be argued that any notice is sufficient which is in accordance with the law of the foreign country⁹. If the defendant agreed to submit to the jurisdiction of the foreign court¹⁰ he may be said to have agreed to submit to the foreign court's rules of procedure, and to be bound by its judgment even though he may not have had notice of the proceedings¹¹. It is nevertheless open to the defendant to argue that, notwithstanding the above, there was a breach of the rules of natural justice in the manner in which the proceedings against him were conducted in the foreign court¹².

1 *Buchanan v Rucker* (1808) 9 East 192; *Price v Dewhurst* (1837) 8 Sim 279; *Henderson v Henderson* (1844) 6 QB 288 at 298; *Sheehy v Professional Life-Assurance Co* (1857) 2 CBNS 211; *Crawley v Isaacs* (1867) 16 LT 529; *Liverpool Marine Credit Co v Hunter* (1867) LR 4 Eq 62 at 68 (on appeal (1868) 3 Ch App 479); *Pemberton v Hughes* [1899] 1 Ch 781 at 790, CA (foreign divorce decree); *Robinson v Fenner* [1913] 3 KB 835; *Bergerem v Marsh* (1921) 91 LJKB 80; *Richardson v Army, Navy and General Assurance Association Ltd* (1925) 21 Ll L Rep 345; *Jacobson v Frachon* (1927) 138 LT 386, CA; *Adams v Cape Industries plc* [1990] Ch 433, [1991] 1 All ER 929, CA. However, it is not clear from *Adams v Cape Industries plc* supra whether there is a formal distinction between natural and substantial justice.

2 *De Cosse Brissac v Rathbone* (1861) 6 H & N 301 (the sixth plea). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 *Scarpetta v Lowenfeld* (1911) 27 TLR 509 (exclusion of personal evidence of the parties to the proceedings); *Robinson v Fenner* [1913] 3 KB 835 (exclusion of evidence of fraud by a third party tendered as relieving defendant from a promise to pay).

4 *Pemberton v Hughes* [1899] 1 Ch 781, CA (foreign divorce decree).

5 *Jacobson v Frachon* (1927) 138 LT 386 at 390, 392, CA (judgment founded on biased and erroneous evidence); and see the cases cited in note 1 supra.

6 *Jet Holdings Inc v Patel* [1990] 1 QB 335, [1989] 2 All ER 648, CA. An objection founded upon lack of notice or lack of an opportunity to be heard may be taken de novo in England, but in other cases it is necessary to examine the entirety of the foreign procedure before concluding that it operated in violation of English conceptions of natural or substantial justice: *Adams v Cape Industries plc* [1990] Ch 433, [1991] 1 All ER 929, CA.

7 See para 143 ante.

8 See para 144 ante.

9 See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 531-535.

10 See para 145 ante.

11 *Vallée v Dumergue* (1849) 4 Exch 290; *Bank of Australasia v Harding* (1850) 9 CB 661; *Bank of Australasia v Nias* (1851) 16 QB 717; *Copin v Adamson* (1875) 1 ExD 17, CA; *Feyerick v Hubbard* (1902) 71 LJB 509; *Jeannot v Fuerst* (1909) 25 TLR 424. Cf the Administration of Justice Act 1920 s 9(2) (see para 167 post); and the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(1)(a)(iii) (see para 176 post).

12 See *Adams v Cape Industries plc* [1990] Ch 433 at 570, [1991] 1 All ER 929 at 1052-1053, CA.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/(iii) Conclusiveness of Foreign Judgments in Personam/154. Injunction.

154. Injunction.

The English court has jurisdiction to grant an injunction to restrain anyone subject to its jurisdiction from enforcing a judgment in the foreign court¹. If such a person has committed a breach of contract, or has acted in breach of some fiduciary duty, or has in any way violated the principles of equity and conscience in obtaining the foreign judgment, it may restrain him personally from seeking to enforce that judgment in the foreign court². However, although in theory such an injunction does not seek to interfere with the foreign court, as, in issuing it, the English court is exercising its jurisdiction in personam³, nevertheless a court will be very slow to restrain a judgment creditor from seeking to enforce his judgment in a court which may be presumed to have its own procedures to prevent improper behaviour on the part of the judgment creditor⁴.

1 *Ellerman Lines Ltd v Read* [1928] 2 KB 144, CA (judgment in rem). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Ellerman Lines Ltd v Read* [1928] 2 KB 144 at 155, CA. See also *Tracom SA v Sudan Oil Seeds Co Ltd* [1983] 3 All ER 137, [1983] 1 WLR 1026, CA; *Tracom SA v Sudan Oil Seeds Co Ltd (No 2)* [1983] 3 All ER 140, [1983] 1 WLR 1026, CA; *Youell v Kara Mara Shipping Co Ltd* [2000] 2 Lloyd's Rep 102 (the prosecution of proceedings in breach of an exclusive jurisdiction clause amounted to an invasion of an equitable right).

3 *Ellerman Lines Ltd v Read* [1928] 2 KB 144 at 151-152, 155, CA.

4 *ED & F Man (Sugar) Ltd v Haryanto (No 2)* [1991] 1 Lloyd's Rep 429, CA. See also *Zeeland Navigation Co Ltd v Banque Worms, The Foresight Driller II* [1995] 1 Lloyd's Rep 251.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/(iv) Enforcement of Foreign Judgments in Personam/155. Conditions of enforcement.

(iv) Enforcement of Foreign Judgments in Personam

155. Conditions of enforcement.

A foreign judgment in personam given by a court of competent jurisdiction¹ is enforceable by action in England² provided that:

105 (1) it is for a definite sum of money³, other than a sum payable in respect of taxes, penalties or multiple damages⁴; and

106 (2) it is final and conclusive⁵.

1 See paras 142-149 ante.

2 It may, however, be impeached on the grounds set out in paras 151-153 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 See para 156 post.

4 See para 157 post.

5 See para 158 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/(iv) Enforcement of Foreign Judgments in Personam/156. Judgment must be for definite sum.

156. Judgment must be for definite sum.

To be enforceable by action upon the judgment at common law, a foreign judgment must be for a definite sum¹. An order for the payment of costs is therefore not enforceable until the costs have been taxed². A sum is sufficiently certain for this purpose if it can be ascertained by a simple arithmetical process³.

The decree in equity of a foreign court can be sued upon in England, provided it orders the payment of an ascertained sum by one party to the other, as, for example, a balance due on a dissolution of partnership⁴, or in connection with a trust or an executorship⁵.

1 *Sadler v Robins* (1808) 1 Camp 253; *Hall v Odber* (1809) 11 East 118 at 123; *Henley v Soper* (1828) 8 B & C 16; *Henderson v Henderson* (1844) 6 QB 288; *Beatty v Beatty* [1924] 1 KB 807, CA.

2 Cf *Sadler v Robins* (1808) 1 Camp 253. A final order for costs in a foreign divorce suit is enforceable in England: *Russell v Smyth* (1842) 9 M & W 810. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 *Beatty v Beatty* [1924] 1 KB 807, CA.

4 *Henley v Soper* (1828) 8 B & C 16.

5 *Henderson v Henderson* (1844) 6 QB 288.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/(iv) Enforcement of Foreign Judgments in Personam/157. Judgment must not be for taxes or penalties, or for multiple damages.

157. Judgment must not be for taxes or penalties, or for multiple damages.

As the English court will not entertain an action for the enforcement, either directly or indirectly, of a foreign penal or revenue law¹, it will not enforce a foreign judgment ordering the payment of taxes² or penalties³. A judgment which enforces both civil and criminal liability is severable, and that part of it which awards a sum of money as damages is enforceable in England⁴.

Proceedings may not be brought to enforce a judgment which was given for multiple damages⁵, that is, one in which the foreign court arrived at its conclusion by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the judgment creditor⁶. The rule is not limited to denying enforcement of the balance over the compensatory amount: the judgment is unenforceable in respect of the entire sum⁷.

1 See paras 32-33 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Government of India, Ministry of Finance (Revenue Division) v Taylor* [1955] AC 491 at 514, [1955] 1 All ER 292 at 301, HL; *Rossano v Manufacturers' Life Insurance Co* [1963] 2 QB 352 at 376-378, [1962] 2 All ER 214 at 228-229; cf *Brokaw v Seatrain UK Ltd* [1971] 2 QB 476, [1971] 2 All ER 98, CA.

3 *Huntingdon v Attrill* [1893] AC 150, PC; *United States of America v Inkley* [1989] QB 255, [1988] 3 All ER 144, CA. But an order for exemplary damages is, as a matter of common law at least, probably enforceable and is not (in this sense) penal: *SA Consortium General Textiles v Sun & Sand Agencies Ltd* [1978] QB 279, [1978] 2 All ER 339, CA.

4 *Raulin v Fischer* [1911] 2 KB 93 (French order for compensation to 'partie civile'); *Black v Yates* [1992] QB 526, [1991] 4 All ER 722.

5 Protection of Trading Interests Act 1980 s 5(1), (2)(a).

6 *Ibid* s 5(3). A qualified right to certain victims of such a judgment to bring an action to recover the excess element if it has been compelled to pay it is given by s 6.

7 See *ibid* s 5(1), which prohibits proceedings for 'any sum payable under such a judgment'.

UPDATE

157 Judgment must not be for taxes or penalties, or for multiple damages

NOTE 7--Where the judgment consists partly of purely compensatory damages and partly of a multiple element reached by multiplying a basic award, only the multiple element is rendered unenforceable: *Lewis v Eliades* [2003] EWCA Civ 1758, [2004] 1 All ER 1196, [2004] 1 All ER (Comm) 545, [2004] 1 WLR 692.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/(iv) Enforcement of Foreign Judgments in Personam/158. Judgment must be final and conclusive.

158. Judgment must be final and conclusive.

In order to be enforceable, a judgment must finally and conclusively determine the rights and liabilities of the parties to it so as to be *res judicata* in the country where it has been pronounced¹.

A judgment is not final and conclusive if the court which has pronounced it has power to rescind or vary it subsequently². Consequently no judgment of a foreign court in proceedings of an executive nature, in which the defendant is precluded from raising all available defences, and which may be rendered null and void by subsequent plenary proceedings in the same court, will be enforced by the English court³. The same is true of an interim order for payment of money into court⁴ and of an order for payment of costs to one party on his undertaking to repay them in the event of his failing upon appeal⁵. A judgment for maintenance or similar periodical payments may be final and conclusive as regards payments already due, if the foreign court has no power to vary or remit arrears⁶. A judgment may be final and conclusive even before it can be enforced by execution in the foreign country⁷.

The judgment must be final in the particular court in which it was pronounced⁸, but it does not cease to be final merely because it may be the subject of an appeal to a higher court, or because an appeal is actually pending⁹, unless a stay of execution has been granted in the foreign country pending the hearing of the appeal¹⁰. Where no such stay has been granted, the judgment may be enforced in England¹¹, but in a proper case the English court may order a stay of the English proceedings pending an appeal¹².

1 *Nouvion v Freeman* (1889) 15 App Cas 1, HL; *Plummer v Woodburne* (1825) 4 B & C 625; *Paul v Roy* (1852) 15 Beav 433; *Patrick v Shedden* (1853) 2 E & B 14; *Frayes v Worms* (1861) 10 CBNS 149; *Re Macartney, Macfarlane v Macartney* [1921] 1 Ch 522 at 531-532; *Blohn v Dessler* [1962] 2 QB 116, [1961] 3 All ER 1; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 918-919, 936, 969-970, [1966] 2 All ER 536 at 555, 566, 587, HL; *Berliner Industriebank AG v Jost* [1971] 2 QB 463 at 470-471, [1971] 2 All ER 1513 at 1518, CA. The onus of proof that the judgment is final and conclusive lies on the party asserting this fact: *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* supra at 927, 970 and 560, 587.

Where a foreign court order is made without a hearing on the merits, requiring production of documents in breach of a bank's duty of confidentiality to its customer, that order is not treated as being analogous to a foreign judgment, and an injunction may be granted restraining compliance with it: *X AG v A Bank* [1983] 2 All ER 464, [1983] 2 Lloyd's Rep 535.

2 *Nouvion v Freeman* (1889) 15 App Cas 1, HL; *Re Macartney, Macfarlane v Macartney* [1921] 1 Ch 522 at 531-532; *Blohn v Dessler* [1962] 2 QB 116, [1961] 3 All ER 1; *Ascot Commodities NV v Northern Pacific Shipping, The Irini A (No 2)* [1999] 1 Lloyd's Rep 189; cf *Charm Maritime Inc v Kyriakou and Mathias* [1987] 1 Lloyd's Rep 433, CA. Although a default judgment can be final and conclusive, albeit one that may be set aside by the court which pronounced it (*Vanquelin v Bouard* (1863) 15 CBNS 341 at 367-368), a default judgment obtained in a foreign court on a cause of action based on fraud is not: *Masters v Leaver* [2000] BPIR 284, [2000] IL Pr 387, CA. See also Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 476-478.

3 *Nouvion v Freeman* (1889) 15 App Cas 1, HL; cf *Blohn v Dessler* [1962] 2 QB 116, [1961] 3 All ER 1 (Austrian judgment against partner as member of firm not enforceable against partner personally without further Austrian proceedings in which personal defences would be available). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 *Paul v Roy* (1852) 15 Beav 433.

5 *Patrick v Shedden* (1853) 2 E & B 14.

6 *Beatty v Beatty* [1924] 1 KB 807, CA. If the judgment is capable of variation in respect of arrears as well as future payments, it is unenforceable at common law in England: *Harrop v Harrop* [1920] 3 KB 386; *Re Macartney, Macfarlane v Macartney* [1921] 1 Ch 522; cf *Bailey v Bailey* (1884) 13 QBD 855, CA; *Robins v Robins* [1907] 2 KB 13. As to the reciprocal enforcement of maintenance orders by statute see paras 293-335 post.

7 *Berliner Industriebank AG v Jost* [1971] 2 QB 463, [1971] 2 All ER 1513, CA (unconditional ascertainment of debt in German bankruptcy proceedings carrying with it the right to levy execution on after-acquired property only after the termination of the bankruptcy proceedings).

8 *Beatty v Beatty* [1924] 1 KB 807 at 816, CA.

9 *Scott v Pilkington* (1862) 2 B & S 11; *Beatty v Beatty* [1924] 1 KB 807 at 815-816, CA; *Colt Industries Inc v Sarlie (No 2)* [1966] 3 All ER 85, [1966] 1 WLR 1287, CA. Contrast the Administration of Justice Act 1920 s 9(2) (e) (see para 167 post); and the Foreign Judgments (Reciprocal Enforcement) Act 1933 ss 1(3), 5(1) (see paras 172, 179 post).

10 *Berliner Industriebank AG v Jost* [1971] 2 QB 463 at 470-471, [1971] 2 All ER 1513 at 1518, CA, approving *Colt Industries Inc v Sarlie (No 2)* [1966] 3 All ER 85 at 88, [1966] 1 WLR 1287 at 1293.

11 *Scott v Pilkington* (1862) 2 B & S 11; *Colt Industries Inc v Sarlie (No 2)* [1966] 3 All ER 85, [1966] 1 WLR 1287, CA.

12 *Scott v Pilkington* (1862) 2 B & S 11; *Nouvion v Freeman* (1889) 15 App Cas 1 at 13, HL; cf *Colt Industries Inc v Sarlie (No 2)* [1966] 3 All ER 85, [1966] 1 WLR 1287, CA.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/(iv) Enforcement of Foreign Judgments in Personam/159. Proceedings.

159. Proceedings.

An action on a foreign judgment may be initiated in England¹ for the amount of the judgment debt and costs, and summary judgment may be given for the claimant². In the action for enforcement the claimant may claim the amount of the judgment in the foreign currency in which it was rendered, the date for conversion into sterling being the date of payment³.

A foreign judgment in personam cannot be enforced in England by an action in rem⁴.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Grant v Easton* (1888) 13 QBD 302, CA; cf *Codd v Delap* (1905) 92 LT 510, HL. The proceedings are therefore largely formal unless the defendant can set up a credible defence to enforcement. Costs will not normally be awarded if the foreign judgment is capable of registration under the Administration of Justice Act 1920: see s 9(5); and para 169 post. No action may be brought at all on a judgment which is registrable under the Foreign Judgments (Reciprocal Enforcement) Act 1933: see s 6; and para 175 post.

3 I.e. the date when the court authorises enforcement of the judgment in terms of sterling: *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, [1975] 3 All ER 801, HL.

4 *The City of Mecca* (1881) 6 PD 106, CA; *The Sylt* [1991] 1 Lloyd's Rep 240.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/(v) Foreign Judgments in Personam as Defences/160. Pleading foreign judgment in defence.

(v) Foreign Judgments in Personam as Defences

160. Pleading foreign judgment in defence.

The judgment of a foreign court of competent jurisdiction¹ is in general a good defence² to an action brought in England³ by the successful party in respect of the same cause of action whether the judgment was in favour of the defendant⁴ or (for a lesser sum than he had claimed) for the claimant⁵.

1 See paras 142-149 ante. In order to use the foreign judgment against the party who was claimant in the foreign court it is necessary to regard the foreign court as jurisdictionally competent, for the claimant in those proceedings must be taken to have submitted to its jurisdiction.

2 It may, however, be impeached on the grounds set out in paras 151-153 ante.

3 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 *Plummer v Woodburne* (1825) 4 B & C 625; *Ricardo v Garcias* (1845) 12 Cl & Fin 368; *Société Générale de Paris v Dreyfus Bros* (1887) 37 ChD 215, CA; *Jacobson v Frachon* (1927) 138 LT 386, CA; *DSV Silo-und Verwaltungsgesellschaft mbH v Sennar (Owners), The Sennar* [1985] 2 All ER 104, [1985] 1 WLR 490, HL.

5 See the Civil Jurisdiction and Judgments Act 1982 s 34; and para 141 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/(v) Foreign Judgments in Personam as Defences/161. Judgment in favour of defendant.

161. Judgment in favour of defendant.

In order to be a good defence to an action in England¹ on the original cause of action, a foreign judgment must be final and conclusive² between the parties³. The judgment must also have been pronounced upon the merits of the case⁴, and for this purpose a determination of a foreign court wholly or partly by reference to a foreign statute of limitation is a determination on the merits⁵. The judgment must, however, be in respect of the same cause of action⁶, and a claimant who has unsuccessfully attempted to obtain rescission of a contract in a foreign court will not be debarred from bringing an action for damages for breach of the same contract in an English court⁷. A foreign judgment in personam is a bar to proceedings in rem in England in respect of the same subject matter⁸.

In the exercise of its discretion, the English court will not give permission to serve the claim form out of the jurisdiction in a case where the claimant's cause of action depends wholly upon the law of a foreign country, the courts of which have already decided that no cause of action exists⁹. In the converse situation, the English court will restrain a claimant from proceeding with an action abroad after the English court has given judgment against him in an action on the same question¹⁰.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Plummer v Woodburne* (1825) 4 B & C 625; *Frayes v Worms* (1861) 10 CBNS 149; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, [1966] 2 All ER 536, HL; and see para 158 ante.

3 There must be identity of parties (or their privies): *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 900, 911, 928-929, 936-937, 944-946, [1966] 2 All ER 536 at 550, 561, 566-567, 571-572, HL; *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241, [1990] 2 All ER 990, CA; *Republic of India v India SS Co Ltd (Indian Endurance and Indian Grace) (No 2)* [1998] AC 878, [1997] 4 All ER 380, HL.

4 *Re Low, Bland v Low* [1894] 1 Ch 147 at 162, CA; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 927, 969, [1966] 2 All ER 536 at 560, 586-587, HL; *DSV Silo-und Verwaltungsgesellschaft mbH v Sennar (Owners)*, *The Sennar* [1985] 2 All ER 104, [1985] 1 WLR 490, HL; *Vervaeke (formerly Messina) v Smith* [1983] 1 AC 145, [1982] 2 All ER 144, HL; *Tracom SA v Sudan Oil Seeds Co Ltd* [1983] 1 All ER 404, [1983] 1 WLR 662 (affd [1983] 3 All ER 137, [1983] 1 WLR 1026); *ED & F Man (Sugar) Ltd v Yani Haryanto (No 2)* [1991] 1 Lloyd's Rep 429, CA. A judgment by consent or in default may be a judgment on the merits: *Re South American and Mexican Co, ex p Bank of England* [1895] 1 Ch 37, CA.

5 See the Foreign Limitation Periods Act 1984 s 3; and para 26 ante.

6 *Callandar v Dittrich* (1842) 4 Man & G 68; cf *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, [1966] 2 All ER 536, HL.

7 *Callandar v Dittrich* (1842) 4 Man & G 68. As to rescission of contract see CONTRACT vol 9(1) (Reissue) para 986 et seq; and as to damages for breach of contract see CONTRACT vol 9(1) (Reissue) para 1012.

8 *The Griefswald* (1859) Sw 430 at 435. The rule that money paid under pressure of legal process cannot be recovered applies to legal process in a foreign country: *Clydesdale Bank Ltd v Schröder & Co* [1913] 2 KB 1.

It is arguable that a foreign judgment cannot be relied upon as a defence in English proceedings if it was not given until after those proceedings began, but the matter is far from settled: *Bell v Holmes* [1956] 3 All ER 449, [1956] 1 WLR 1359; *Morrison Rose & Partners v Hillman* [1961] 2 All ER 891, [1961] 2 QB 266, CA; *El du Pont de Nemours v Agnew (No 2)* [1988] 2 Lloyd's Rep 240, CA. But see also *The Delta*, *The Erminia Foscolo* (1876) 1 PD 393; *Houstoun v Marquis of Sligo* (1885) 29 ChD 448 at 454, CA; cf *Mutrie v Binney* (1887) 35 ChD 614, CA; and see CIVIL PROCEDURE vol 12 (2009) PARA 1168 et seq.

9 See *Société Générale de Paris v Dreyfus Bros* (1887) 37 ChD 215 at 225, CA.

10 *Booth v Leycester* (1837) 1 Keen 579 at 580; and see para 137 ante. See also *ED & F Man (Sugar) Ltd v Yani Haryanto (No 2)* [1991] 1 Lloyd's Rep 429, CA; *Zeeland Navigation Co Ltd v Banque Worms, The Foresight Driller II* [1995] 1 Lloyd's Rep 251.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/(vi) Foreign Judgments in Rem/162. In general.

(vi) Foreign Judgments in Rem

162. In general.

A judgment in rem may be defined as the judgment of a court of competent jurisdiction when it determines the status of a person or thing, or the disposition of a thing, as distinct from the particular interest that a party to the litigation has in it¹. Thus the judgment in rem vests in a person the possession of or property in a thing or decrees the sale of a thing in satisfaction of a claim against the thing itself, or is a judgment as to the status of a person².

A judgment in rem pronounced by a court of competent jurisdiction is conclusive and binding in England³, not only between parties and privies, as in the case of a judgment in personam⁴, but against all the world⁵.

1 *Castrique v Imrie* (1870) LR 4 HL 414 at 427 et seq; *Lazarus-Barlow v Regent Estates Co Ltd* [1949] 2 KB 465 at 475, [1949] 2 All ER 118 at 122, CA.

2 *Fracis Times & Co v Carr* (1900) 82 LT 698 at 701-702, CA; revsd on other grounds sub nom *Carr v Fracis Times & Co* [1902] AC 176, HL. A further type of judgment in rem is a judgment ordering movables to be sold by way of administration. As to administration in bankruptcy see BANKRUPTCY AND INDIVIDUAL INSOLVENCY; as to administration on death see EXECUTORS AND ADMINISTRATORS.

3 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 See para 161 text and note 2 ante.

5 *Castrique v Imrie* (1870) LR 4 HL 414; *Castrique v Behrens* (1861) 3 E & E 709; *Messina v Petrococcino* (1872) LR 4 PC 144; *Meyer v Ralli* (1876) 1 CPD 358; *The City of Mecca* (1879) 5 PD 28 (revsd on other grounds (1881) 6 PD 106, CA); *Re Trufort, Trafford v Blanc* (1887) 36 ChD 600; *Ballantyne v Mackinnon* [1896] 2 QB 455 at 462, CA; *Minna Craig SS Co v Chartered Mercantile Bank of India, London and China* [1897] 1 QB 460, CA; *Bater v Bater* [1906] P 209, CA; *Salvesen (or von Lorang) v Administrator of Austrian Property* [1927] AC 641, HL.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/(vi) Foreign Judgments in Rem/163. Judgments in rem relating to movables.

163. Judgments in rem relating to movables.

A foreign judgment in rem relating to movables will be recognised and enforced in England if the movables were situated in the foreign country at the time of the proceedings¹. The judgment need not be an actual adjudication as to the status of the thing itself². A decision as to right or title will of course be conclusive, but so also will any disposition by the court by way of sale, transfer or otherwise³, as, for example, where an Admiralty court orders the sale of a ship to satisfy a maritime lien⁴, or a prize court orders the sale of goods because they have been adjudged lawful prize⁵. In such a case the foreign court can give a bona fide purchaser a title which cannot be impeached in England, even though by English law, but for the foreign judgment, some other person would have been regarded as owner of the thing sold or as having preferential rights over it⁶.

It seems that a foreign judgment in rem relating to movables can be enforced in England by an action in rem⁷.

1 *Castrique v Imrie* (1870) LR 4 HL 414; *Meyer v Ralli* (1876) 1 CPD 358; *The City of Mecca* (1879) 5 PD 28 (revsd on other grounds (1881) 6 PD 106, CA); *Re Trufort, Trafford v Blanc* (1887) 36 ChD 600; *Minna Craig SS Co v Chartered Mercantile Bank of India, London and China* [1897] 1 QB 460, CA. Cf the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(2)(b); and para 177 post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Castrique v Imrie* (1870) LR 4 HL 414 at 428.

3 *Castrique v Imrie* (1870) LR 4 HL 414 at 428.

4 *Minna Craig SS Co v Chartered Mercantile Bank of India, London and China* [1897] 1 QB 460, CA; and see SHIPPING AND MARITIME LAW vol 94 (2008) PARA 1014 et seq.

5 *Stringer v English and Scottish Marine Insurance Co* (1870) LR 5 QB 599, Ex Ch; *Castrique v Imrie* (1870) LR 4 HL 414 at 428; and see PRIZE.

6 See *Cammell v Sewell* (1860) 5 H & N 728; *Alcock v Smith* [1892] 1 Ch 238, CA.

7 *The City of Mecca* (1879) 5 PD 28 (revsd on other grounds (1881) 6 PD 106, CA); *The Despina GK* [1983] QB 214, [1983] 1 All ER 1.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/(vi) Foreign Judgments in Rem/164. Judgments in rem relating to immovables.

164. Judgments in rem relating to immovables.

A foreign judgment in rem relating to immovables will be recognised in England if the immovables are situated in the foreign country¹.

¹ See paras 399-402 post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(2) ENFORCEMENT OF FOREIGN JUDGMENTS BY ACTION AT COMMON LAW/(vi) Foreign Judgments in Rem/165. Judgments relating to personal status.

165. Judgments relating to personal status.

The rules relating to the recognition of foreign judgments affecting personal status are set out elsewhere in this title¹.

¹ As to divorce, nullity and legal separation see paras 251-260 post. As to the presumption of death and dissolution of marriage see para 263 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(i) Enforcement of Foreign Judgments by Registration under the Administration of Justice Act 1920/166. Application of the Administration of Justice Act 1920.

(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE

(i) Enforcement of Foreign Judgments by Registration under the Administration of Justice Act 1920

166. Application of the Administration of Justice Act 1920.

Under provisions of the Administration of Justice Act 1920¹, where a judgment² has been obtained in a superior court in any part of Her Majesty's dominions outside the United Kingdom³ to which the provisions extend⁴, the judgment creditor⁵ may apply to the High Court in England⁶, at any time within 12 months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court⁷. The court may order the judgment to be registered if it thinks, in all the circumstances, that it is just and convenient that the judgment should be enforced in the United Kingdom⁸.

1 These provisions are, however, liable to be superseded. Where an Order in Council makes the Foreign Judgments (Reciprocal Enforcement) Act 1933 Pt I (ss 1-7) (see paras 171-182 post) operative in relation to any part of Her Majesty's dominions, the Administration of Justice Act 1920 Pt II (ss 9-13) (as amended) ceases to have effect in relation to that part of those dominions: Foreign Judgments (Reciprocal Enforcement) Act 1933 s 7(2). As a result, the Administration of Justice Act 1920 Pt II (as amended) can now only apply to those territories to which it applied at the date of the Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions, etc) Order 1933, SR & O 1933/1073 (ie 10 November 1933): see the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 7(1); and para 171 post. See also note 4 infra. As to Her Majesty's dominions see COMMONWEALTH vol 13 (2009) PARA 707.

2 'Judgment' means any judgment or order given or made by a court in any civil proceedings whereby any sum of money is made payable, and includes an award in proceedings on an arbitration if, in pursuance of the law in force in the place where it was made, the award has become enforceable in the same manner as a judgment: Administration of Justice Act 1920 s 12(1). It does not include, for instance, an order setting aside an assignment of property: *Platt v Platt* 1958 SC 95. The procedure for registering foreign arbitral awards is governed by those parts of CPR Pt 74 (see note 6 infra; and paras 167-168 post) that are specified in CPR 62.20-62.21 (see ARBITRATION vol 2 (2008) PARA 1293). As to the enforcement of foreign maintenance orders see paras 292-335 post.

3 A number of the territories to which the Administration of Justice Act 1920 was extended have ceased to be parts of Her Majesty's dominions on, for example, becoming republics within the Commonwealth. It is customary in such cases for United Kingdom legislation to provide for existing law to be applied as regards the new republic, and this ensures that existing orders remain in force. For the meaning of 'United Kingdom' see para 4 ante. As to the Commonwealth see COMMONWEALTH vol 13 (2009) PARA 701.

4 See notes 1, 3 supra. The Administration of Justice Act 1920 Pt II (as amended) might be extended by Order in Council to any part of Her Majesty's dominions outside the United Kingdom, including protectorates and mandated territories: s 13. Orders were made extending the Act to various territories. Provision is made for the consolidation of such orders: see the Administration of Justice Act 1920 s 14(3) (added by the Civil Jurisdiction and Judgments Act 1982 s 35(3)). The various orders were consolidated by the Reciprocal Enforcement of Judgments (Administration of Justice Act 1920, Part II) (Consolidation) Order 1984, SI 1984/129 (amended by SI 1985/1994; SI 1994/1901; SI 1997/2601). Accordingly the Administration of Justice Act 1920 Pt II (as amended) now extends to the following territories: Anguilla, Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, Botswana, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Christmas Island, Cocos (Keeling) Islands, Cyprus, Dominica, Falkland Islands, Fiji, Gambia, Ghana, Grenada, Guyana, Hong Kong, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Malta, Mauritius, Montserrat, Newfoundland, New Zealand, Nigeria, Norfolk Island, Papua New Guinea, St Christopher and Nevis, St Helena, St Lucia, St Vincent

and the Grenadines, Seychelles, Sierra Leone, Singapore, Solomon Islands, Sovereign Base Areas of Akrotiri and Dhekalia in Cyprus, Sri Lanka, Swaziland, Tanzania, Trinidad and Tobago, Turks and Caicos Islands, Tuvalu, Uganda, Zambia, and Zimbabwe.

5 'Judgment creditor' means the person by whom the judgment was obtained, and includes the successors and assigns of that person: Administration of Justice Act 1920 s 12(1).

6 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

7 Administration of Justice Act 1920 s 9(1). An application is made to the High Court and may be made without notice (CPR 74.3(2)), and must be supported by written evidence exhibiting: (1) the judgment or a verified or certified or otherwise authenticated copy of it; and (2) where the judgment is not in English, a translation of it into English certified by a notary public or other qualified person, or accompanied by written evidence confirming that the translation is accurate (CPR 74.4(1)). 'Judgment' means, subject to any other enactment, any judgment given by a foreign court or tribunal, whatever the judgment may be called, and includes a decree, an order, a decision, a writ of execution and the determination of costs by an officer of the court: CPR 74.2(1)(c). The written evidence in support of the application must state: (a) the name of the judgment creditor and his address for service within the jurisdiction; (b) the name of the judgment debtor and his address or place of business, if known; (c) the grounds on which the judgment creditor is entitled to enforce the judgment; (d) in the case of a money judgment, the amount in respect of which it remains unsatisfied; and (e) where interest is recoverable on the judgment under the law of the state of origin, the amount of interest which has accrued up to the date of the application or the rate of interest, the date from which it is recoverable, and the date on which it ceases to accrue: CPR 74.4(2). 'State of origin', in relation to any judgment, means the state in which that judgment was given: CPR 74.2(1)(d). Written evidence in support of an application under the Administration of Justice Act 1920 must also state that the judgment is not a judgment: (i) which, under s 9, may not be ordered to be registered; or (ii) to which the Protection of Trading Interests Act 1980 s 5 (see para 167 post) applies: CPR 74.4(3). See also *Practice Direction--Enforcement of Judgments in Different Jurisdictions* PD74.

8 Administration of Justice Act 1920 s 9(1).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(i) Enforcement of Foreign Judgments by Registration under the Administration of Justice Act 1920/167. Restrictions on registration.

167. Restrictions on registration.

No judgment¹ may be ordered to be registered² if:

- 107 (1) the court by which the judgment was given acted without jurisdiction³; or
- 108 (2) the judgment debtor⁴, being a person who was neither carrying on business nor ordinarily resident⁵ within the jurisdiction of the court by which the judgment was given, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court⁶; or
- 109 (3) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the court by which the judgment was given and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court, or agreed to submit to its jurisdiction⁷; or
- 110 (4) the judgment was obtained by fraud⁸; or
- 111 (5) the judgment debtor satisfies the court to which the application is made, either that an appeal is pending or that he is entitled and intends to appeal against the judgment⁹; or
- 112 (6) the judgment was in respect of a cause of action which for reasons of public policy¹⁰, or for some other similar reason, could not have been entertained by the registering court to which application is made¹¹.

Furthermore, registration is within the discretion of the English court and is only allowed if the court thinks it just and convenient that the judgment should be enforced in the United Kingdom¹².

The registration order must be served upon the judgment debtor¹³, who may apply to have it set aside¹⁴.

A judgment to which provisions of the Protection of Trading Interests Act 1980¹⁵ apply may not be registered under the Administration of Justice Act 1920¹⁶.

1 For the meaning of 'judgment' see para 166 note 2 ante.

2 Ie under the Administration of Justice Act 1920 s 9: see para 166 ante.

3 Ibid s 9(2)(a). Cf para 142 et seq ante.

4 'Judgment debtor' means the person against whom the judgment was given, and includes the person against whom it is enforceable in the place where it was given: ibid s 12(1).

5 For the meaning of 'ordinarily resident' see para 58 ante.

6 Administration of Justice Act 1920 s 9(2)(b). See also *Sfeir & Co v National Insurance Co of New Zealand Ltd* [1964] 1 Lloyd's Rep 330.

7 Administration of Justice Act 1920 s 9(2)(c).

8 Ibid s 9(2)(d). The defence of fraud is in terms identical with that applicable to an action upon a foreign judgment at common law: *Owens Bank Ltd v Bracco* [1992] 2 AC 443, [1992] 2 All ER 193, HL. See para 151 ante.

9 Administration of Justice Act 1920 s 9(2)(e).

10 Cf para 152 ante.

11 Administration of Justice Act 1920 s 9(2)(f).

12 Ibid s 9(1); and see para 166 text and note 7 ante. As it is not expressly provided in the Act that a judgment for a foreign penalty or tax is excluded from registration, the exclusion of such a judgment could be accommodated within this provision. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. For the meaning of 'United Kingdom' see para 4 ante.

13 An order granting permission to register a judgment (a 'registration order') must be drawn up by the judgment creditor and served on the judgment debtor: (1) by delivering it to him personally; (2) as provided by the Companies Act 1985 s 725 (see COMPANIES); or (3) in such other manner as the court may direct: CPR 74.6(1). Permission is not required to serve a registration order out of the jurisdiction, and CPR 6.24-6.26, 6.29 (see CIVIL PROCEDURE vol 11 (2009) PARAS 173-176, 179) apply to such an order as they apply to a claim form: CPR 74.6(2). A registration order must state: (a) full particulars of the judgment registered (CPR 74.6(3)(a)); (b) the name of the judgment creditor and his address for service within the jurisdiction (CPR 74.6(3)(b)); (c) the right of the judgment debtor to apply to have the registration set aside (CPR 74.6(3)(c)); (d) the period within which such an application or appeal may be made (CPR 74.6(3)(d)); and (e) that no measures of enforcement will be taken before the end of that period, other than measures ordered by the court to preserve the property of the judgment debtor (CPR 74.6(3)(e)).

14 An application to set aside a registration must be made within the period set out in the registration order: CPR 74.7(1). The court may extend that period; but an application for such an extension must be made before the end of the period as originally fixed or as subsequently extended: CPR 74.7(2). The court hearing the application may order any issue between the judgment creditor and the judgment debtor to be tried: CPR 74.7(3).

15 Ie the Protection of Trading Interests Act 1980 s 5. That provision applies to any judgment given by a court of an overseas country which is:

32 (1) a judgment for multiple damages (see para 157 ante) (s 5(2)(a));

33 (2) a judgment based on a provision or rule of law specified by order (s 5(2)(b)); or

34 (3) a judgment on a claim for contribution in respect of damages awarded by a judgment falling within head (1) or head (2) supra (s 5(2)(c)).

At the date at which this volume states the law, no order had been made for the purposes of head (2) supra. As to the power to make such orders see also s 5(3), (4).

16 Ibid s 5(1).

UPDATE

167 Restrictions on registration

NOTE 13--Head (2) now refers to the Companies Act 2006: CPR 74.6(1) (amended by SI 2008/2178, SI 2009/2092). CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(i) Enforcement of Foreign Judgments by Registration under the Administration of Justice Act 1920/168. Effect of registration.

168. Effect of registration.

From the date of its registration¹ a registered judgment² has the same force and effect, and proceedings may be taken on it, as if it had been a judgment originally obtained or entered on the date of registration in the registering court³. That court has the same control and jurisdiction over the judgment as it has over similar judgments given by itself, but only in so far as relates to execution⁴. The reasonable costs of, and incidental to, registration⁵ are recoverable as if they were sums payable under the judgment⁶.

1 le under the Administration of Justice Act 1920 s 9: see paras 166-167 ante.

2 For the meaning of 'judgment' see para 166 note 2 ante.

3 Administration of Justice Act 1920 s 9(3)(a). No steps may be taken to enforce a judgment: (1) before the end of the period specified in accordance with CPR 74.6(3)(d) (see para 167 note 13 ante), or that period as extended by the court; or (2) where there is an application to set aside registration under CPR 74.7 (see para 167 note 14 ante), until the application has been determined: CPR 74.9(1). Any party wishing to enforce a judgment must file evidence of the service on the judgment debtor of the registration order and any other relevant order of the court: CPR 74.9(2). The court may make orders to preserve the property of the judgment debtor pending final determination of any issue relating to the enforcement of the judgment: CPR 74.9(3). See also *Practice Direction--Enforcement of Judgments in Different Jurisdictions* PD74.

4 Administration of Justice Act 1920 s 9(3)(b).

5 These include the costs of obtaining a certified copy of the judgment from the court by which the judgment was given, and of the application for registration: *ibid* s 9(3)(c).

6 *Ibid* s 9(3)(c). As to the power to make rules of court see ss 9(4), 11. The provisions of CPR 25.12-25.15 (see CIVIL PROCEDURE vol 11 (2009) PARAS 745-748) apply to an application for security for the costs of the application for registration, any proceedings brought to set aside the registration, and any appeal against the granting of the registration, as if the judgment creditor were a claimant: CPR 74.5(1).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(i) Enforcement of Foreign Judgments by Registration under the Administration of Justice Act 1920/169. Action on judgment.

169. Action on judgment.

If an action is brought in any court in the United Kingdom¹ on any judgment² which might be ordered to be registered³, the claimant will not be entitled to the costs of the action unless an application for registration has been refused or unless the court otherwise orders⁴.

1 For the meaning of 'United Kingdom' see para 4 ante.

2 For the meaning of 'judgment' see para 166 note 2 ante.

3 I.e. under the Administration of Justice Act 1920 s 9: see paras 166-167 ante.

4 Ibid s 9(5). No action may be brought on the underlying cause of action in any event: see the Civil Jurisdiction and Judgments Act 1982 s 34; and para 141 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(i) Enforcement of Foreign Judgments by Registration under the Administration of Justice Act 1920/170. Certificates of judgments.

170. Certificates of judgments.

Where a judgment¹ has been obtained in the High Court in England² against any person, and the judgment creditor³ wishes to secure the enforcement of the judgment in some part of Her Majesty's dominions outside the United Kingdom⁴ to which Part II of the Administration of Justice Act 1920⁵ applies, then on an application made by the judgment creditor, the court must issue to him a certified copy of the judgment⁶.

1 For the meaning of 'judgment' see para 166 note 2 ante.

2 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 For the meaning of 'judgment creditor' see para 166 note 5 ante.

4 For the meaning of 'United Kingdom' see para 4 ante. As to Her Majesty's dominions see COMMONWEALTH vol 13 (2009) PARA 707.

5 Ie the Administration of Justice Act 1920 Pt II (ss 9-13) (amended): see paras 166-167 ante.

6 Ibid s 10 (substituted by the Civil Jurisdiction and Judgments Act 1982 s 35(2)). A judgment creditor who applies to enforce in a foreign country a judgment obtained in the High Court must apply for a certified copy of the judgment (CPR 74.12(1), (2)); and such an application may be made without notice (CPR 74.12(3)). The application must be supported by written evidence exhibiting copies of:

35 (1) the claim form in the proceedings in which judgment was given (CPR 74.13(1)(a));

36 (2) evidence that it was served on the defendant (CPR 74.13(1)(b));

37 (3) the statements of case (CPR 74.13(1)(c)); and

38 (4) where relevant, a document showing that for those proceedings the applicant was an assisted person or an LSC funded client, as defined in CPR 43.2(1)(h), (i) respectively (CPR 74.13(1)(d)).

'Assisted person' means an assisted person within the statutory provisions relating to legal aid: CPR 43.2(1)(h). 'LSC funded client' means an individual who receives services funded by the Legal Services Commission as part of the Community Legal Service within the meaning of the Access to Justice Act 1999 Pt I (ss 1-26) (as amended) (see LEGAL AID vol 65 (2008) PARA 31 et seq): CPR 43.2(1)(i).

The written evidence must:

39 (a) identify the grounds on which the judgment was obtained (CPR 74.13(2)(a));

40 (b) state whether the defendant objected to the jurisdiction and, if he did, the grounds of his objection (CPR 74.13(2)(b));

41 (c) show that the judgment has been served in accordance with CPR Pt 6 (see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq) and CPR 40.4 (see CIVIL PROCEDURE vol 12 (2009) PARA 1140), and is not subject to a stay of execution (CPR 74.13(2)(c));

42 (d) state: (i) the date on which the time for appealing expired or will expire; (ii) whether an appeal notice has been filed; (iii) the status of any application for permission to appeal; and (iv) whether an appeal is pending (CPR 74.13(2)(d));

43 (e) state whether the judgment provides for the payment of a sum of money, and if so, the amount in respect of which it remains unsatisfied (CPR 74.13(2)(e)); and

- 44 (f) state whether interest is recoverable on the judgment, and if so, either the amount of interest which has accrued up to the date of the application, or the rate of interest, the date from which it is recoverable, and the date on which it ceases to accrue (CPR 74.13(2)(f)).

See also *Practice Direction--Enforcement of Judgments in Different Jurisdictions* PD74.

UPDATE

170 Certificates of judgments

NOTE 6--CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(ii) Enforcement of Foreign Judgments by Registration under the Foreign Judgments (Reciprocal Enforcement) Act 1933/171. Application of the Foreign Judgments (Reciprocal Enforcement) Act 1933.

(ii) Enforcement of Foreign Judgments by Registration under the Foreign Judgments (Reciprocal Enforcement) Act 1933

171. Application of the Foreign Judgments (Reciprocal Enforcement) Act 1933.

The principle whereby foreign judgments are registered on a reciprocal basis is applied in the Foreign Judgments (Reciprocal Enforcement) Act 1933¹, under which, where a foreign country will give substantial reciprocity of treatment as respects the enforcement of judgments² given in courts of the United Kingdom³, an Order in Council may direct that:

- 113 (1) Part I of the Act⁴ is to extend to that country⁵;
- 114 (2) such courts of that country as may be specified are to be recognised for the purposes of the Act⁶; and
- 115 (3) judgments of any such recognised court, or of any specified class, are to be judgments to which the Act applies⁷.

Any such Order in Council may be varied or revoked⁸.

The Act also provides for its own extension, by Order in Council, to Her Majesty's dominions⁹ outside the United Kingdom, and to judgments obtained in the courts of those jurisdictions¹⁰. This power has been exercised¹¹, with the effect that no new Orders may be made under Part II of the Administration of Justice Act 1920¹². A further Order in Council is required to bring into effect the enforcement machinery of the Foreign Judgments (Reciprocal Enforcement) Act 1933 in relation to any particular part of Her Majesty's dominions¹³. When such a further Order is made, the corresponding Order made pursuant to the Administration of Justice Act 1920 ceases to have effect¹⁴.

Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 has also been extended, with modifications, to certain other foreign judgments by the Carriage of Goods by Road Act 1965¹⁵, the Nuclear Installations Act 1965¹⁶, the Carriage of Passengers by Road Act 1974¹⁷, the International Transport Conventions Act 1983¹⁸, and the Merchant Shipping Act 1995¹⁹, but only in relation to proceedings under those Acts.

Rules of court may make provision with respect to various matters connected with the registration of judgments under the Foreign Judgments (Reciprocal Enforcement) Act 1933²⁰.

1 The Foreign Judgments (Reciprocal Enforcement) Act 1933 was variously amended by the Civil Jurisdiction and Judgments Act 1982 s 35(1), Sch 10 in order to extend the application of its main provisions from superior courts to recognised courts, and to include within its scope judgments providing for interim payments and certain arbitration awards. The type of award to which this applies is an award in proceedings on an arbitration which has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place: Foreign Judgments (Reciprocal Enforcement) Act 1933 s 10A (as added by the Civil Jurisdiction and Judgments Act 1982 Sch 10 para 4). The procedure for registering foreign arbitral awards (see para 173 post) is governed by those parts of CPR Pt 74 that are specified in CPR 62.20, 62.21 (see ARBITRATION vol 2 (2008) PARA 1293). As to the enforcement of foreign arbitral awards see ARBITRATION vol 2 (2008) PARA 1288.

2 For the meaning of 'judgment' see para 172 post.

3 Reciprocity must be found to exist between the courts of that country or any particular class of courts and the similar courts of the United Kingdom: Foreign Judgments (Reciprocal Enforcement) Act 1933 s 1(1) (substituted by the Civil Jurisdiction and Judgments Act 1982 Sch 10 para 1(1), (2)). In the Foreign Judgments (Reciprocal Enforcement) Act 1933 (except s 10 (as substituted) (see para 180 post)), 'court' includes a tribunal: s 11(1) (definition added by the Civil Jurisdiction and Judgments Act 1982 Sch 10 para 5(1), (2)). As to the continued entitlement of courts identified by Orders in Council made prior to this amendment see the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 1(5) (added by the Civil Jurisdiction and Judgments Act 1982 Sch 10 para 1(3)). For the meaning of 'United Kingdom' see para 4 ante.

4 le the Foreign Judgments (Reciprocal Enforcement) Act 1933 Pt I (ss 1-7) (as amended).

5 Ibid s 1(1)(a) (as substituted: see note 3 supra). The following Orders in Council have been made under this provision: the Reciprocal Enforcement of Foreign Judgments (France) Order in Council 1936, SR & O 1936/609; the Reciprocal Enforcement of Foreign Judgments (Belgium) Order in Council 1936, SR & O 1936/1169; the Reciprocal Enforcement of Foreign Judgments (Pakistan) Order 1958, SI 1958/141; the Reciprocal Enforcement of Foreign Judgments (India) Order 1958, SI 1958/425; the Reciprocal Enforcement of Foreign Judgments (Germany) Order 1961, SI 1961/1199; the Reciprocal Enforcement of Foreign Judgments (Norway) Order 1962, SI 1962/636; the Reciprocal Enforcement of Foreign Judgments (Austria) Order 1962, SI 1962/1339; the Reciprocal Enforcement of Foreign Judgments (The Netherlands) Order 1969, SI 1969/1063 (amended by SI 1977/2149); the Reciprocal Enforcement of Foreign Judgments (Israel) Order 1971, SI 1971/1039; the Reciprocal Enforcement of Foreign Judgments (Guernsey) Order 1973, SI 1973/610; the Reciprocal Enforcement of Foreign Judgments (Isle of Man) Order 1973, SI 1973/611; the Reciprocal Enforcement of Foreign Judgments (Jersey) Order 1973, SI 1973/612; the Reciprocal Enforcement of Foreign Judgments (Italy) Order 1973, SI 1973/1894; the Reciprocal Enforcement of Foreign Judgments (Tonga) Order 1980, SI 1980/1523; the Reciprocal Enforcement of Foreign Judgments (Suriname) Order 1981, SI 1981/735; the Reciprocal Enforcement of Foreign Judgments (Canada) Order 1987, SI 1987/468 (amended by SI 1987/2211; SI 1988/1304; SI 1988/1853; SI 1989/987; SI 1991/1724; SI 1992/1731; SI 1995/2708); and the Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994, SI 1994/1901. The Orders in Council in respect of Austria, Belgium, France, Germany, Italy and The Netherlands are for most purposes superseded by the provisions of the 'Brussels I' Regulation: see para 65 note 13 ante. As to the relevant provisions see para 183 et seq post. The Pakistan Act 1990 s 1, Sch para 8 made provision in relation to the Reciprocal Enforcement of Foreign Judgments (Pakistan) Order 1958, SI 1958/141, consequential on the re-admission of Pakistan as a member of the Commonwealth.

6 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 1(1)(b) (as substituted: see note 3 supra).

7 Ibid s 1(1)(c) (as substituted: see note 3 supra).

8 Ibid s 1(4).

9 As to Her Majesty's dominions see COMMONWEALTH vol 13 (2009) PARA 707.

10 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 7(1).

11 See the Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions etc) Order 1933, SR & O 1933/1073.

12 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 7(1). As to the Administration of Justice Act 1920 Pt II (ss 9-13) (as amended) see paras 166-170 ante.

13 *Yukon Consolidated Gold Corp'n Ltd v Clark* [1938] 2 KB 241, [1938] 1 All ER 366, CA; and see note 5 supra.

14 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 7(2). Part I (as amended) will apply to an existing judgment given by a court of a country to which, by such an Order, that Part is newly extended provided that the judgment is registered within 12 months of the date when it was given or within such longer period as the High Court may allow: see the Administration of Justice Act 1956 s 51(b).

A judgment registered or dealt with under the Administration of Justice Act 1920 Pt II (as amended) or attendant provisions before an Order implementing the Foreign Judgments (Reciprocal Enforcement) Act 1933 comes into operation will, once that Order comes into operation, be treated as falling within the scope of the latter Act and its attendant provisions: Administration of Justice Act 1956 s 51(c).

15 See the Carriage of Goods by Road Act 1965 s 4 (judgments of foreign courts under the Convention to which the Act gives effect); and CARRIAGE AND CARRIERS vol 7 (2008) PARA 678. The Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(2), (3) does not apply.

16 See the Nuclear Installations Act 1965 s 17(4) (certain judgments certified as determined under an international agreement); and FUEL AND ENERGY vol 19(3) (2007 Reissue) para 1508. The Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(1)(a)(ii), (2), (3) does not apply.

17 See the Carriage of Passengers by Road Act 1974 s 5(1), (2) (certain judgments to enforce claims arising out of international carriage of passengers by road); and CARRIAGE AND CARRIERS vol 7 (2008) PARA 657. The Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(2), (3) does not apply.

18 See the International Transport Conventions Act 1983 s 6 (certain judgments to enforce a claim for the death of or personal injury to a passenger by rail in international carriage); and CARRIAGE AND CARRIERS vol 7 (2008) PARA 683. The Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(2), (3) does not apply.

19 See the Merchant Shipping Act 1995 ss 166(4), 177(4), (5) (certain judgments relating to liability in respect of oil pollution); and ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 45 (2010) PARA 456. In each case the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(2), (3) does not apply.

20 See *ibid* s 3(1) (amended by the Supreme Court Act 1981 ss 152(1), 153(4), Sch 5). Such rules have effect subject to the provisions of the Orders mentioned in note 5 *supra*, for which there is otherwise no power to make rules of court: Foreign Judgments (Reciprocal Enforcement) Act 1933 s 3(2).

UPDATE

171 Application of the Foreign Judgments (Reciprocal Enforcement) Act 1933

NOTE 5--SI 1971/1039 amended: SI 2003/2618.

TEXT AND NOTE 17--1974 Act repealed: Statute Law (Repeals) Act 2004.

NOTE 20--1933 Act s 3(1) amended: Courts Act 2003 Sch 8 para 78. Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(ii) Enforcement of Foreign Judgments by Registration under the Foreign Judgments (Reciprocal Enforcement) Act 1933/172. Judgments to which the statutory provisions apply.

172. Judgments to which the statutory provisions apply.

The Foreign Judgments (Reciprocal Enforcement) Act 1933 applies to judgments, defined as judgments or orders made by a recognised¹ court² in civil proceedings, or in criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party³. The judgment must be for a sum of money, not being a tax, fine or penalty⁴, or for multiple damages⁵. It must be final and conclusive⁶ as between the judgment debtor⁷ and the judgment creditor⁸, or require the making of an interim payment⁹. It must have been pronounced after the commencement of the Order in Council extending the Act to the foreign country concerned¹⁰, and must have been pronounced, or the final appeal disposed of, within six years before the application for registration¹¹.

The Act does not, however, apply to a judgment of a recognised court which is:

- 116 (1) a judgment given on appeal from a court which is not a recognised court; or
- 117 (2) a judgment or other instrument which is regarded for the purposes of enforcement as a judgment of that court but was given or made in another country; or
- 118 (3) a judgment given by that court in proceedings founded on a judgment of a court in another country and having as their objective the enforcement of that judgment¹².

1 As to the recognition of courts see para 171 text and note 6 ante.

2 For the meaning of 'court' see para 171 note 3 ante.

3 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 11(1).

4 Ibid s 1(2)(b) (s 1(2) substituted by the Civil Jurisdiction and Judgments Act 1982 s 35(1), Sch 10 para 1(2)).

5 Protection of Trading Interests Act 1980 s 5. See paras 157 ante, 173 note 14 post.

6 As to what is final and conclusive see para 158 ante. For this purpose a judgment may be held to be final and conclusive even if an appeal is pending or may be initiated in courts of the country of the original court: Foreign Judgments (Reciprocal Enforcement) Act 1933 s 1(3). 'Country of the original court' means the country in which the original court is situated; 'original court' means the court by which the judgment was given; 'appeal' includes any proceeding for discharging or setting aside a judgment, for a new trial or for a stay of execution: s 11(1).

7 'Judgment debtor' means the person against whom the judgment was given, and includes any person against whom it is enforceable under the law of the original court: ibid s 11(1).

8 'Judgment creditor' means the person in whose favour the judgment was given, and includes any person in whom the rights under it have become vested by succession or assignment or otherwise: ibid s 11(1).

9 Ibid s 1(2)(a) (as substituted: see note 4 supra).

10 Ibid s 1(2)(c) (as substituted: see note 4 supra). See para 171 ante.

11 Ibid s 2(1). 'Registration' means registration under Pt I (ss 1-7) (as amended), and 'register' and 'registered' must be construed accordingly: s 11(1).

12 Ibid s 1(2A) (added by the Civil Jurisdiction and Judgments Act 1982 Sch 10 para 1). The identity of a court, not its jurisdiction or the capacity in which it was acting when giving judgment, determines whether it is a recognised court for the purposes of the Foreign Judgments (Reciprocal Enforcement) Act 1933: *Ahmed v Habib Bank Ltd* [2001] EWCA Civ 1270, [2002] 1 Lloyd's Rep 444.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(ii) Enforcement of Foreign Judgments by Registration under the Foreign Judgments (Reciprocal Enforcement) Act 1933/173. Registration.

173. Registration.

Application for registration¹ of a judgment² is made by the judgment creditor³ to the High Court⁴. The judgment may not be registered if it has been wholly satisfied⁵, or if it is not capable of being enforced by execution in the country in which it was pronounced⁶. On proof of these and other prescribed matters⁷ the court must order the judgment to be registered⁸.

If it appears to the court that the judgment deals with different matters, the judgment may be registered only in respect of those of its provisions which could be registered if they were the subject of separate judgments⁹. If the sum payable under the judgment is expressed in foreign currency, registration may take place in that currency¹⁰. If the judgment has been partially satisfied, it is registered in respect of the balance remaining payable at the date of registration¹¹. In addition to the sums due under the judgment, including any interest which by the law of the original court¹² becomes due under the judgment up to the date of registration, the judgment must be registered for the reasonable costs of and incidental to registration, including the cost of obtaining a certified copy of the foreign judgment¹³.

A judgment to which the Protection of Trading Interests Act 1980 applies may not be registered under the Foreign Judgments (Reciprocal Enforcement) Act 1933¹⁴.

1 For the meaning of 'registration' and cognate expressions see para 172 note 11 ante.

2 For the meaning of 'judgment' see para 172 ante.

3 For the meaning of 'judgment creditor' see para 172 note 8 ante.

4 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 2(1). An application is made to the High Court and may be made without notice (CPR 74.3(2)), and must be supported by written evidence as specified in CPR 74.4(1)-(2) (see para 166 note 7 ante). Written evidence in support of an application under the Foreign Judgments (Reciprocal Enforcement) Act 1933 must also:

45 (1) state that the judgment is a money judgment (CPR 74.4(4)(a));

46 (2) confirm that it can be enforced by execution in the state of origin (CPR 74.4(4)(b));

47 (3) confirm that the registration could not be set aside under the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4 (CPR 74.4(4)(c));

48 (4) confirm that the judgment is not a judgment to which the Protection of Trading Interests Act 1980 s 5 applies (see para 167 text and notes 15-16 ante) (CPR 74.4(4)(d));

49 (5) where the judgment contains different provisions, some but not all of which can be registered for enforcement, set out those provisions in respect of which it is sought to register the judgment (CPR 74.4(4)(e)); and

50 (6) be accompanied by any further evidence as to the enforceability of the judgment in the state of origin, and the law of that state under which any interest has become due under the judgment, which may be required under the relevant Order in Council extending the Foreign Judgments (Reciprocal Enforcement) Act 1933 Pt I (ss 1-7) (amended) to that state (see para 171 ante) (CPR 74.4(4)(f)).

See also *Practice Direction--Enforcement of Judgments in Different Jurisdictions* PD74.

5 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 2(1) proviso (a).

6 Ibid s 2(1) proviso (b). See *Re a Debtor (No 11 of 1939), Debtor v Creditor and Official Receiver* [1939] 2 All ER 400, CA (enforceability by execution at the time of registration is alone relevant, and it is immaterial that the judgment may later become unenforceable).

7 See note 4 supra.

8 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 2(1). The procedure for registering such a judgment (a 'registration order') is given in CPR 74.6 (see para 167 note 13 ante). The court has no discretion to refuse registration. Contrast the position under the Administration of Justice Act 1920: see para 167 text and note 12 ante.

9 See the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 2(5).

10 The provision to the contrary contained in *ibid* s 2(3) was repealed by the Administration of Justice Act 1977 ss 4, 32(4), Sch 5 Pt I.

11 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 2(4).

12 For the meaning of 'original court' see para 172 note 6 ante.

13 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 2(6). The procedure for making an application for security for the costs is given in CPR 74.5(1) (see para 168 note 6 ante), unless the relevant Order in Council (see para 171 ante) otherwise provides (CPR 74.5(3)).

14 Protection of Trading Interests Act 1980 s 5(1). See para 167 text and notes 15-16 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(ii) Enforcement of Foreign Judgments by Registration under the Foreign Judgments (Reciprocal Enforcement) Act 1933/174. Effect of registration.

174. Effect of registration.

For the purposes of execution, a registered¹ judgment² has the same force and effect, and proceedings may be taken on it, and the sum carries interest, and the High Court has the same control over execution, as if the judgment had been one originally given by the High Court and entered on the date of registration³. No execution may issue so long as it is competent for application to be made to have the registration set aside or, where such an application is made, until after it has been finally determined⁴. The period within which such an application may be made must be stated in the order for registration⁵.

1 For the meaning of 'registered' see para 172 note 11 ante.

2 For the meaning of 'judgment' see para 172 ante.

3 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 2(2).

4 Ibid s 2(2) proviso. The procedure for enforcement of a judgment is given in CPR 74.9 (see para 168 note 3 ante). See also *Practice Direction--Enforcement of Judgments in Different Jurisdictions* PD74.

5 CPR 74.6(3)(d). See note 4 supra; and para 173 note 8 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(ii) Enforcement of Foreign Judgments by Registration under the Foreign Judgments (Reciprocal Enforcement) Act 1933/175. Non-registration of registrable judgment.

175. Non-registration of registrable judgment.

If a foreign judgment¹ is one which may be registered under the Foreign Judgments (Reciprocal Enforcement) Act 1933², no proceedings for the recovery of the sum payable under it can be entertained in any court in the United Kingdom otherwise than by way of registration of the judgment³; nor may proceedings subsequently be brought on the original cause of action⁴. If, however, the judgment is not entitled to be registered, it is still possible to seek to enforce it by action at common law under the rules set out elsewhere in this title⁵.

1 For the meaning of 'judgment' see para 172 ante.

2 See para 172 ante.

3 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 6. See *Re a Judgment Debtor (No 2176 of 1938)* [1939] Ch 601, [1939] 1 All ER 1, CA. For the meaning of 'United Kingdom' see para 4 ante.

4 See the Civil Jurisdiction and Judgments Act 1982 s 34; and para 141 ante.

5 See paras 140-161 ante. However, many of the reasons why the judgment is incapable of registration under Foreign Judgments (Reciprocal Enforcement) Act 1933 (see para 172 ante), or which will lead to the registration being set aside (see para 176 post), are also defences to an action on the judgment at common law, so in practice there will be few instances in which this freedom has any value.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(ii) Enforcement of Foreign Judgments by Registration under the Foreign Judgments (Reciprocal Enforcement) Act 1933/176. Setting aside registration.

176. Setting aside registration.

An order for the registration¹ of a foreign judgment² must be set aside on the application³ of any party against whom the registered judgment may be enforced if the registering court⁴ is satisfied:

- 119 (1) that the judgment is not one to which Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933⁵ applies or that it was registered in contravention of the provisions of that Part⁶; or
- 120 (2) that the courts⁷ of the country of the original court⁸ had no jurisdiction in the circumstances of the case⁹; or
- 121 (3) that the judgment debtor¹⁰, being the defendant in the proceedings in the original court, did not receive notice of those proceedings in sufficient time to enable him to defend and did not appear¹¹; or
- 122 (4) that the judgment was obtained by fraud¹²; or
- 123 (5) that enforcement would be contrary to English public policy¹³; or
- 124 (6) that the rights under the judgment are not vested in the person who applied for registration¹⁴.

Registration of a foreign judgment may be set aside if the registering court is satisfied that, prior to the date of the judgment in the original court, the matter in dispute had been the subject of a final and conclusive judgment of a court having jurisdiction in the matter¹⁵.

1 For the meaning of 'registration' see para 172 note 11 ante.

2 For the meaning of 'judgment' see para 172 ante.

3 The procedure for applying to set aside registration is given in CPR 74.7 (see para 167 note 14 ante). See also *Practice Direction--Enforcement of Judgments in Different Jurisdictions* PD74.

4 'Registering court' means the court to which an application to register the judgment is made: Foreign Judgments (Reciprocal Enforcement) Act 1933 s 11(1).

5 *le* *ibid* Pt I (ss 1-7) (as amended): see para 172 ante.

6 *Ibid* s 4(1)(a)(i).

7 For the meaning of 'court' see para 171 note 3 ante.

8 For the meaning of 'country of the original court' see para 172 note 6 ante.

9 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(1)(a)(ii). The foreign court is deemed not to have had jurisdiction in the cases mentioned in para 178 post and, subject to that, is deemed to have had jurisdiction in the cases mentioned in para 177 post.

10 For the meaning of 'judgment debtor' see para 172 note 7 ante.

11 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(1)(a)(iii). This is so notwithstanding that process may have been duly served on him in accordance with the law of the country of the foreign court: s 4(1)(a)(iii). See *Re a Debtor (No 11 of 1939), Debtor v Creditor and Official Receiver* [1939] 2 All ER 400, CA.

12 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(1)(a)(iv). See *Syal v Heyward* [1948] 2 KB 443, [1948] 2 All ER 576, CA. Fraud will have the same meaning as in relation to a judgment enforced by action at common law: cf *Owens Bank Ltd v Bracco* [1992] 2 AC 443, [1991] 4 All ER 833, HL (the reasoning in which case appears to be applicable to the meaning of fraud under the Foreign Judgments (Reciprocal Enforcement) Act 1933); and see para 151 ante.

13 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(1)(a)(v); cf para 152 ante. See also *Ahmed v Habib Bank Ltd* [2001] EWCA Civ 40, [2002] 1 Lloyd's Rep 444 (permission to appeal in England refused in relation to the public policy ground since it was not arguable that the situation in a foreign country deprived the applicant of the opportunity of appealing before the national court). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

14 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(1)(a)(vi).

15 *Ibid* s 4(1)(b). As to the circumstances in which a court is deemed to have jurisdiction see para 177 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(ii) Enforcement of Foreign Judgments by Registration under the Foreign Judgments (Reciprocal Enforcement) Act 1933/177. Circumstances in which a foreign court is deemed to have jurisdiction.

177. Circumstances in which a foreign court is deemed to have jurisdiction.

For the purposes of an application to set aside the registration¹ of a foreign judgment², a foreign court³ is deemed to have had jurisdiction in an action in personam⁴ if the judgment debtor⁵ who was a defendant in that court:

- 125 (1) submitted to the jurisdiction of that court by voluntarily appearing in the proceedings⁶; or
- 126 (2) had, before the commencement of the proceedings, agreed in respect of the subject matter of the proceedings to submit to the jurisdiction of that court or of the courts of the country of that court⁷; or
- 127 (3) was, when the proceedings were instituted, resident in, or, being a body corporate, had its principal place of business in, the country of that court⁸; or
- 128 (4) had an office or place of business in the country of that court, and the proceedings were in respect of a transaction effected through or at that office or place⁹.

The foreign court is so deemed to have had jurisdiction if the judgment debtor was the claimant in or counterclaimed in the proceedings in that court¹⁰.

In an action of which the subject matter was immovable property, or in an action in rem of which the subject matter was movable property, the foreign court is deemed to have jurisdiction if, at the time of the proceedings, the property in question was situated in the country of that court¹¹.

In the case of a judgment given in an action other than such kinds of action as are mentioned above, the foreign court is deemed to have jurisdiction if its jurisdiction is recognised by the law of England¹².

1 For the meaning of 'registration' see para 172 note 11 ante.

2 See para 176 ante. For the meaning of 'judgment' see para 172 ante.

3 I.e. the 'original court', for the meaning of which see para 172 note 6 ante.

4 This is subject to the rules set out in para 178 post. 'Action in personam' does not include any matrimonial cause or any proceedings in connection with matrimonial matters, administration of the estates of deceased persons, bankruptcy, winding up, proceedings relating to mental disorder or guardianship of minors: Foreign Judgments (Reciprocal Enforcement) Act 1933 s 11(2).

5 For the meaning of 'judgment debtor' see para 172 note 7 ante.

6 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(2)(a)(i) (amended by the Civil Jurisdiction and Judgments Act 1982 s 54, Sch 14). As to when appearance is deemed not to constitute submission see the Civil Jurisdiction and Judgments Act 1982 s 33(1); as to provisions unaffected by this provision see s 33(2) (as amended); and for transitional provisions see s 53, Sch 13 para 9. See also para 144 ante.

7 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(2)(a)(iii).

8 Ibid s 4(2)(a)(iv). Note that mere presence is not sufficient to satisfy the jurisdictional requirement for registration under the Act. Cf *Adams v Cape Industries plc* [1990] Ch 433, [1991] 1 All ER 929, CA; and see para 143 ante.

9 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(2)(a)(v).

10 Ibid s 4(2)(a)(ii).

11 Ibid s 4(2)(b).

12 Ibid s 4(2)(c). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(ii) Enforcement of Foreign Judgments by Registration under the Foreign Judgments (Reciprocal Enforcement) Act 1933/178. Circumstances in which a foreign court has no jurisdiction.

178. Circumstances in which a foreign court has no jurisdiction.

For the purposes of an application to set aside the registration¹ of a foreign judgment², the courts of the country of the original court³ are deemed not to have had jurisdiction:

- 129 (1) if the subject matter of the proceedings was immovable property situated outside the foreign country in question; or
- 130 (2) if the judgment debtor⁴, being a defendant in the original proceedings, was a person who, under the rules of public international law⁵, was entitled to immunity from the jurisdiction of the courts of the country of the foreign court⁶ and did not submit to the jurisdiction of that court⁷.

A court is also deemed to have no jurisdiction where the proceedings were brought before it in breach of an agreement for the settlement of disputes⁸.

1 For the meaning of 'registration' see para 172 note 11 ante.

2 See para 176 ante. For the meaning of 'judgment' see para 172 ante.

3 For the meaning of 'country of the original court' see para 172 note 6 ante.

4 For the meaning of 'judgment debtor' see para 172 note 7 ante.

5 See INTERNATIONAL RELATIONS LAW.

6 See para 63 ante.

7 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 4(3) (amended by the Civil Jurisdiction and Judgments Act 1982 s 54, Sch 14).

8 See the Civil Jurisdiction and Judgments Act 1982 s 32(1); and para 147 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(ii) Enforcement of Foreign Judgments by Registration under the Foreign Judgments (Reciprocal Enforcement) Act 1933/179. Court's powers on application to set aside.

179. Court's powers on application to set aside.

If an applicant for the setting aside of the registration¹ of a foreign judgment² satisfies the registering court³ either that an appeal⁴ is pending or that he is entitled to appeal and intends to appeal against the judgment, the court may, if it thinks fit, on such terms as it may think just, either set aside the registration or adjourn the application until after the expiration of such period as appears to it to be reasonably sufficient to enable the applicant to take the necessary steps to have the appeal disposed of by the competent tribunal⁵. If the registration is set aside under this power, or if it is set aside solely for the reason that, at the date of the application for registration, the judgment was not enforceable by execution in the foreign country⁶, the setting aside of the registration does not prejudice a further application for registration when the appeal is disposed of or if and when the judgment becomes enforceable by execution in that country⁷. Where the registration is set aside solely for the reason that the judgment, although partly satisfied at the date of the application for registration, was registered for the whole sum payable under it, then, on the application of the judgment creditor⁸, the judgment must be registered for the balance remaining payable at that date⁹.

1 For the meaning of 'registration' see para 172 note 11 ante.

2 See para 176 ante. For the meaning of 'judgment' see para 172 ante.

3 For the meaning of 'registering court' see para 176 note 4 ante.

4 For the meaning of 'appeal' see para 172 note 6 ante.

5 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 5(1). See also *SA Consortium General Textiles v Sun and Sand Agencies Ltd* [1978] QB 279, [1978] 2 All ER 339, CA.

6 See para 173 note 6 ante.

7 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 5(2).

8 For the meaning of 'judgment creditor' see para 172 note 8 ante.

9 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 5(3).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(ii) Enforcement of Foreign Judgments by Registration under the Foreign Judgments (Reciprocal Enforcement) Act 1933/180. Certificates of judgments.

180. Certificates of judgments.

Rules¹ may be made enabling any judgment creditor² who wishes to secure the enforcement of a judgment³ in a foreign country to which Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933⁴ extends⁵ to obtain a copy of the judgment and a certificate giving particulars relating to the judgment and the proceedings in which it was given⁶.

1 'Rules' means, in relation to judgments given by a court, rules of court, and in relation to judgments given by any other tribunal, rules or regulations made by the authority having power to make rules or regulations regulating the procedure of that tribunal: Foreign Judgments (Reciprocal Enforcement) Act 1933 s 10(3) (s 10 substituted by the Civil Jurisdiction and Judgments Act 1982 s 35(1), Sch 10 para 3).

2 For the meaning of 'judgment creditor' see para 172 note 8 ante.

3 For the meaning of 'judgment' see para 172 ante. These provisions apply to any judgment given by a court or tribunal in the United Kingdom under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty: Foreign Judgments (Reciprocal Enforcement) Act 1933 s 10(2) (as substituted: see note 1 supra). For the meaning of 'United Kingdom' see para 4 ante.

4 *Ibid* Pt I (ss 1-7) (as amended).

5 See para 171 ante.

6 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 10(1) (as substituted: see note 1 supra). The procedure for making an application for a certified copy of the judgment is given in CPR 74.12-74.13 (see para 170 note 6 ante), except that applications may also be made under the Foreign Judgments (Reciprocal Enforcement) Act 1933 to a county court. See also *Practice Direction--Enforcement of judgments in Different Jurisdictions* PD74.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(ii) Enforcement of Foreign Judgments by Registration under the Foreign Judgments (Reciprocal Enforcement) Act 1933/181. Recognition of foreign judgments.

181. Recognition of foreign judgments.

A judgment¹ to which Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933² applies or would have applied if a sum of money had been payable under it, whether it can be registered³ or not, and whether, if it can be registered, it is registered or not, must be recognised in any court in the United Kingdom⁴ as conclusive between the parties in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings⁵. This provision does not apply where a judgment has been registered and the registration has been set aside on some ground other than that a sum of money was not payable under it, or that it had been wholly or partly satisfied, or that at the date of the application for registration the judgment could not be enforced by execution in the country of the original court⁶; nor does it apply in the case of a judgment not actually registered if it is shown (whether the judgment could have been registered or not) that, if it had been registered, the registration would have been set aside on grounds other than those set out above⁷.

Nothing in the provisions described above prevents any court in the United Kingdom recognising any judgment as conclusive of any matter of law or fact if it would have been so recognised before the passing of the Foreign Judgments (Reciprocal Enforcement) Act 1933⁸.

1 For the meaning of 'judgment' see para 172 ante.

2 I.e. the Foreign Judgments (Reciprocal Enforcement) Act 1933 Pt I (ss 1-7) (as amended).

3 For the meaning of 'registered' see para 172 note 11 ante.

4 For the meaning of 'United Kingdom' see para 4 ante.

5 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 8(1). That provision does not apply to judgments of marital status: *Maples (formerly Melamud) v Maples, Maples v Melamud* [1988] Fam 14, [1987] 3 All ER 188. A foreign judgment dismissing a claim on the ground that it is statute-barred will prevent a further action in England in respect of the same cause of action: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, [1975] 1 All ER 810, HL (approving *Harris v Quine* (1869) LR 4 QB 653 (decided at common law)). See also the Foreign Limitation Periods Act 1984 s 3; and para 26 post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. Where there are two competing foreign judgments, each of which is pronounced by a court of competent jurisdiction and is final and not open to challenge, the earlier in time will prevail: *Showlag v Mansour* [1995] 1 AC 431, [1994] 2 All ER 129, PC. However, as this rule is part of the doctrine of res judicata there may, in rare cases, be circumstances in which the party holding the earlier judgment may be estopped from relying on it: *Showlag v Mansour* supra at 440-441 and 134.

6 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 8(2)(a). As to the grounds for setting aside registration see para 176 ante. For the meaning of 'country of the original court' see para 172 note 6 ante.

7 Ibid s 8(2)(b).

8 Ibid s 8(3).

UPDATE

181 Recognition of foreign judgments

NOTE 5--

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(ii) Enforcement of Foreign Judgments by Registration under the Foreign Judgments (Reciprocal Enforcement) Act 1933/182. Power to make foreign judgments unenforceable.

182. Power to make foreign judgments unenforceable.

If it appears to Her Majesty that the treatment in respect of recognition and enforcement accorded by the courts¹ of any foreign country to judgments given in the courts of the United Kingdom² is substantially less favourable³ than that accorded by the courts of the United Kingdom to judgments of the courts of that country, Her Majesty may by Order in Council provide that, except in so far as the Order in Council otherwise provides, no proceedings are to be entertained in any court in the United Kingdom for the recovery of any sum alleged to be payable under a judgment of a court of that country⁴. Such an Order in Council may be varied or revoked by a subsequent Order in Council⁵.

1 For the meaning of 'court' see para 171 note 3 ante.

2 For the meaning of 'United Kingdom' see para 4 ante.

3 Cf the term 'substantial reciprocity of treatment' as used in the Foreign Judgments (Reciprocal Enforcement) Act 1933 s 1: see para 171 ante.

4 Ibid s 9(1), (2) (s 9(1) amended by the Civil Jurisdiction and Judgments Act 1982 s 35(1), Sch 10 para 2). At the date at which this volume states the law, no such Order in Council had been made.

5 Foreign Judgments (Reciprocal Enforcement) Act 1933 s 9(3).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/A. APPLICATION OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/183. In general.

(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

A. APPLICATION OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS

183. In general.

The rules for the recognition and enforcement of judgments from the courts of member states of the European Union are governed to a very large extent by the 'Brussels I' Regulation and, amongst a limited number of countries, by the Brussels and Lugano Conventions¹.

In order to determine whether the 'Brussels I' Regulation does, or one or other of the Conventions may, regulate the question of recognition and enforcement, it is necessary:

- 131 (1) that the judgment falls within the scope of the 'Brussels I' Regulation or the Convention (as the case may be) in terms of its subject matter²;
- 132 (2) that the judgment was obtained, or the proceedings which gave rise to it were instituted, on a date which allows it to fall within the scope of the 'Brussels I' Regulation or the Convention in question³; and
- 133 (3) that the judgment was given by a court⁴.

If the judgment creditor is able to satisfy the court on these points, the defendant will thereafter be entitled to advance limited grounds of objection based upon:

- 134 (a) the jurisdiction of the court which gave the judgment⁵; or
- 135 (b) certain substantial or procedural objections⁶.

In general, however, it is not open to a judgment debtor to allege that the court which gave judgment violated the jurisdictional provisions of the 'Brussels I' Regulation or the applicable Convention⁷. Nor, in general, is it of any relevance as a ground to oppose recognition or enforcement of the judgment that the judgment debtor had no connection, domiciliary or otherwise, with any Regulation state or contracting state⁸.

The provisions for recognition and enforcement of judgments under the 'Brussels I' Regulation and the Conventions are not confined to money judgments or to final judgments⁹.

1 The Brussels Convention is in force only between Denmark and the other member states of the European Union; the Lugano Convention is in force only between the member states of the European Union and those member states of the European Free Trade Association (excluding Liechtenstein) that do not belong to the European Union, plus Poland: see para 65 ante. For the meaning of 'the European Free Trade Association' see CUSTOMS AND EXCISE vol 12(2) (2007 Reissue) para 8. The 'Brussels I' Regulation is, of course, directly applicable in England. For the meaning of 'directly applicable' see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 23. As to the meanings of 'England', 'English' and 'English law' for the purposes of this title see para 4 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention, and the states as between which it operates, see para 65 note 2 ante. As to the Lugano Convention, and the states as between

which it operates, see para 65 note 3 ante. See paras 184-200 post. For provisions relating to the interpretation of the 'Brussels I' Regulation and the Conventions see paras 67-69 ante.

2 See para 184 post.

3 See para 185 post.

4 See para 186 post. As to the application of the 'Brussels I' Regulation and the Conventions to authentic instruments and court settlements see para 187 post.

5 See para 188 post.

6 See para 189 post.

7 See para 188 post.

8 See para 188 post. For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

9 See para 186 post.

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/A. APPLICATION OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/184. Subject matter of the judgment.

184. Subject matter of the judgment.

The 'Brussels I' Regulation and the Brussels and Lugano Conventions¹ are expressed to apply in civil and commercial matters, but to be inapplicable to revenue, customs or administrative matters². They are also excluded from application to:

- 136 (1) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
- 137 (2) bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
- 138 (3) social security; and
- 139 (4) arbitration³.

It is open to the court in which recognition or enforcement is sought to examine for itself whether the subject matter of the judgment falls within the scope of this regime⁴. To this extent the court called upon to grant recognition will be entitled to examine a matter upon which the jurisdiction of the original court may have been founded⁵.

If the judgment is found by the court not to fall within the scope of the 'Brussels I' Regulation or the Conventions, an alternative method of enforcement must be sought⁶.

1 As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. See also para 183 ante.

2 'Brussels I' Regulation art 1 para 1; Brussels Convention art 1 para 1; Lugano Convention art 1 para 1. See para 74 ante.

3 'Brussels I' Regulation art 1 para 2; Brussels Convention art 1 para 2; Lugano Convention art 1 para 2. See para 74 ante.

4 Case 29/76 *LTU Lufttransportunternehmen GmbH & Co KG v Eurocontrol* [1976] ECR 1541, ECJ; Case 9/77 *Bavaria Fluggesellschaft Schwabe & Co KG and Germanair Bedarfsflugfahrt GmbH & Co KG v Eurocontrol* [1977] ECR 1517, ECJ; Case 145/86 *Hoffman v Krieg* [1988] ECR 645, ECJ.

5 Cf the 'Brussels I' Regulation art 35 para 1; the Brussels Convention art 28, 1st para; the Lugano Convention art 28, 1st para; and para 188 post. It is unclear whether a judgment from another Regulation state or contracting state determining that (for example) a contract contained no valid or binding arbitration clause may be re-examined, or whether (by contrast) it must be treated as a judgment which does fall within the scope of the regime established by the Regulation and Conventions. The case law of the European Court does not free the matter entirely from doubt: see the cases cited in note 4 supra; and see also Case C-190/89 *Marc Rich & Co AG v Società Italiana Impianti PA* [1991] ECR I-3855, ECJ; *Marc Rich & Co AG v Società Italiana Impianti PA (No 2)* [1992] 1 Lloyd's Rep 624, CA; Case C-391/95 *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco Line* [1998] ECR I-7091, ECJ. The duty to recognise the judgment in such a case has been held to be beyond doubt: *The Heidberg* [1994] 2 Lloyd's Rep 287 (obiter). However this cannot be determinative. As to the duty to have regard to the judgments of the European Court and other Regulation states or contracting states see paras 67-69 ante. For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante. As to the meaning of 'European Court' see para 68 note 2 ante.

6 See paras 140-182 ante. As to the recognition and enforcement in England of judgments given in other parts of the United Kingdom see paras 201-205 post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. For the meaning of 'United Kingdom' see para 4 ante.

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/A. APPLICATION OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/185. Date of the judgment.

185. Date of the judgment.

The recognition and enforcement of judgments in England will be governed by the 'Brussels I' Regulation or by the Brussels or Lugano Convention¹ if the Regulation or Convention (as the case may be) was in force in the state in which judgment was given on the date on which the proceedings in that state were instituted². In such a case the court which exercised jurisdiction will have done so, or should have done so, in accordance with the jurisdictional provisions of the 'Brussels I' Regulation or the particular Convention³.

However, where proceedings in the Regulation state⁴ from which the judgment originated were instituted before the entry into force of the Regulation, judgments given after that date are recognised and enforced accordingly⁵ only if:

- 140 (1) the proceedings were instituted after the entry into force of the Brussels or the Lugano Convention both in the Regulation state of origin and in the Regulation state addressed⁶; or
- 141 (2) the jurisdiction of the court which gave judgment was founded upon rules which accorded with those provided for either under the scheme of the Regulation or in a convention concluded between the Regulation state of origin and the state addressed which was in force between the states on the date upon which the proceedings were instituted⁷.

Similarly, if the particular Convention was not in force in the state from which the judgment originated on the date upon which proceedings were instituted, but had come into force in that state prior to the date upon which judgment was given, then recognition or enforcement is obtained under the scheme of the Convention if the jurisdiction of the court which gave judgment was founded upon rules which accorded with the jurisdictional rules of the Convention, or, alternatively, was based upon a Convention in force between the states on the date upon which the proceedings were instituted⁸.

1 As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. See also para 183 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 'Brussels I' Regulation art 66 para 1; Brussels Convention art 54, 1st para; Lugano Convention art 54, 1st para.

3 See generally para 65 et seq ante.

4 For the meaning of 'Regulation state' see para 65 note 6 ante.

5 'Brussels I' Regulation art 66 para 2.

6 Ibid art 66 para 2(a).

7 Ibid art 66 para 2(a). In such a case the court called upon to recognise the judgment must necessarily examine for itself whether the jurisdiction of the court which gave judgment corresponded with the jurisdictional provisions of the Regulation because, ex hypothesi, the court which gave judgment will not have done so itself. It is unclear, however, whether it is the jurisdictional rule relied on, or simply the actual exercise

of jurisdiction in the individual case, which must be examined, but it is thought that the latter would be the more consistent with principle.

8 Brussels Convention art 54, 2nd para; Lugano Convention art 54, 2nd para. The same considerations regarding the examination of jurisdiction apply, *mutatis mutandis*, to the Conventions as apply to the corresponding provisions of the 'Brussels I' Regulation: see note 7 *supra*.

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/A. APPLICATION OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/186. Meaning of 'judgment' for the purposes of the Regulation and Conventions.

186. Meaning of 'judgment' for the purposes of the Regulation and Conventions.

The 'Brussels I' Regulation and the Brussels and Lugano Conventions¹ extend their provisions for recognition and enforcement to any judgment given by a court or tribunal in a Regulation state or contracting state², whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court³.

Three particular forms of order are, nevertheless, excluded. First, as the Conventions have been held to have no application to proceedings to enforce the judgments of a non-contracting state, it appears that a judgment from a court of a Regulation state or contracting state which declares that the judgment of a non-Regulation state or non-contracting state is locally enforceable is not within the scope of the Regulation or Conventions⁴. Secondly, the Regulation and Conventions probably exclude directions given by a national court as to the conduct of proceedings before it, such as orders relating to the taking of evidence⁵. Thirdly, they exclude orders which are not, of their nature, of a kind obtained after enquiry in adversarial proceedings⁶, or which cannot be granted as a provisional measure⁷ under the Regulation or Conventions⁸.

1 As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. See also para 183 ante.

2 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

3 'Brussels I' Regulation art 32; Brussels Convention art 25; Lugano Convention art 25. The Regulation and Conventions therefore extend beyond final judgments for a fixed sum of money: contrast the position at common law (see para 156 ante) or under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (see para 173 ante). The extent to which they apply to orders made by a tribunal presumably depends upon whether the body concerned is exercising judicial functions: art 32 of the Regulation and art 25 of the Conventions would probably apply to such of a tribunal's orders as may be seen as judgments (eg those of an employment tribunal). However, the Regulation art 1 and art 1 of the Conventions exclude orders made by an arbitral tribunal, and orders made by a national court as supervisory authority over an arbitration: see para 184 ante. As to references to numbered articles of the Conventions see para 65 note 8 ante. The definition of 'judgment' given in art 25 of the Conventions is applied for the purposes of the Civil Jurisdiction and Judgments Act 1982 by s 15(1). 'Judgment' in art 25 of the Conventions refers to judicial decisions actually given by a court or tribunal in a contracting state, deciding on its own authority on the issues between the parties: Case C-414/92 *Solo Kleinmotoren GmbH v Boch* [1994] ECR I-2237, ECJ.

4 Case C-129/92 *Owens Bank Ltd v Bracco* [1994] QB 509, [1994] ECR I-117, ECJ. But if the judgment of the non-contracting state were used only as evidence in relation to the underlying cause of action, which is prosecuted de novo in a contracting state, it is thought that the later judgment would fall within the scope of the Conventions and within art 25.

5 See the report of Professor Peter Schlosser (OJ C59, 5.3.79, p 71 at 126) on the Convention on the accession to the 1968 Convention and the 1971 Protocol of Denmark, the Republic of Ireland and the United Kingdom, signed at Luxembourg on 9 October 1978. Cf the Civil Jurisdiction and Judgments Act 1982 s 25(7); and see *CFEM Façades SA v Bovis Construction Ltd* [1992] IL Pr 561.

6 Case 125/79 *Denilauler v Snc Couchet Frères* [1980] ECR 1553, [1981] 1 CMLR 62, ECJ; *EMI Records Ltd v Modern Music Karl-Ulrich Waltherbach GmbH* [1992] QB 115, [1992] 1 All ER 616.

Thus, for these purposes, an asset-freezing order (formerly called a 'Mareva injunction', following *Mareva Cia Naveria SA v International Bulkcarriers SA, The Mareva* [1980] 1 All ER 213n, CA) obtained without notice, or a corresponding order from a court in a Regulation state or contracting state, does not qualify as a judgment, but such an order made by a court after a hearing with notice does: *Normaco Ltd v Lundman* [1999] IL Pr 381, (1999) Times, 6 January. It would be different if any burden of proof on the applicant was greater on the application with notice by reason of the order having already been made without notice: see Case C-123/91 *Minalmet GmbH v Brandeis Ltd* [1992] ECR I-5661, ECJ.

7 le under art 31 of the 'Brussels I' Regulation or under art 24 of the Brussels or Lugano Convention: see para 136 ante.

8 See Case-99/96 *Mietz v Intership Yachting Sneek BV* [1999] ECR I-2277, ECJ.

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/A. APPLICATION OF THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/187. Authentic instruments and court settlements.

187. Authentic instruments and court settlements.

A document which has been formally drawn up or registered as an authentic instrument¹ and which is enforceable in one Regulation state or contracting state² must, in another Regulation state or contracting state, be declared enforceable there, on application made as if for enforcement of a foreign judgment³. Under the Conventions⁴, such an application may be refused only if enforcement of the instrument is contrary to public policy in the state addressed⁵. Under the 'Brussels I' Regulation, enforcement of the instrument must be 'manifestly' contrary to public policy in the Regulation state addressed before the court with which an appeal is lodged⁶ can refuse or revoke a declaration of enforceability⁷.

A settlement approved by a court in the course of proceedings and enforceable in the state in which it was concluded is enforceable in the state addressed under the same conditions as authentic instruments⁸.

Her Majesty may by Order in Council⁹ provide that any provision of the Civil Jurisdiction and Judgments Act 1982, or any other statutory provision, relating to the recognition or enforcement of judgments to which the Brussels or Lugano Convention applies, is to apply with specified modifications¹⁰ to authentic instruments and settlements as if they were judgments¹¹.

1 The instrument produced must satisfy the conditions necessary to establish its authenticity in the state of origin: 'Brussels I' Regulation art 57 para 3; Brussels Convention art 50, 2nd para; Lugano Convention art 50, 2nd para. Under the 'Brussels I' Regulation, arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them are regarded as authentic instruments for this purpose: 'Brussels I' Regulation art 57 para 2. However, a document created without the involvement of a competent public authority is not an 'authentic instrument': Case C-260/97 *Unibank A/S v Christensen* [2000] 1 WLR 1060, ECJ. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. See also para 183 ante.

2 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

3 I.e. an application made in accordance with the procedures described in paras 192-200 post: see CPR 74.11. The provisions of Chapter III, Section 3 (arts 53-56) of the 'Brussels I' Regulation and of Title III, Section 3 (arts 46-49) of the Conventions (see para 192 text and note 19 post) apply as appropriate: 'Brussels I' Regulation art 57 para 4; Brussels Convention art 50, 3rd para; Lugano Convention art 50, 3rd para. The 'Brussels I' Regulation provides for a certificate to be issued at the request of any interested party by the competent authority of a Regulation state where an authentic instrument is drawn up or registered: see art 57 para 4. For the meaning of 'judgment' for these purposes see para 186 ante.

4 For the meaning of 'the Conventions' see para 65 note 5 ante.

5 Brussels Convention art 50, 1st para; Lugano Convention art 50, 1st para.

6 I.e. under the 'Brussels I' Regulation art 43 or art 44: see para 193 post.

7 Ibid art 57 para 1.

8 Ibid art 58; Brussels Convention art 51; Lugano Convention art 51. See note 3 supra. The 'Brussels I' Regulation provides for a certificate to be issued, at the request of any interested party, by the court or competent authority of a Regulation state where a court settlement was approved: art 58.

The irreconcilability of a settlement with a judgment under art 27 of the Conventions (cf art 34 of the 'Brussels I' Regulation) (see para 189 post) does not preclude a challenge to the recognition of a judgment: Case C-414/92 *Solo Kleinmotoren GmbH v Boch* [1994] ECR I-2237, ECJ.

9 Such an Order in Council is subject to annulment in pursuance of a resolution of either House of Parliament: Civil Jurisdiction and Judgments Act 1982 s 13(3).

10 An Order in Council may make different provision in relation to different descriptions of documents and settlements: *ibid* s 13(2).

11 *Ibid* s 13(1) (amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 2 para 8).

The Civil Jurisdiction and Judgments (Authentic Instruments and Court Settlements) Order 2001, SI 2001/3928, arts 2-4 apply:

- 51 (1) the Civil Jurisdiction and Judgments Act 1982 s 4 (as amended) (with a modification), s 6(1), (2) (s 6(1) as amended), s 7(1)-(3), (5) (see paras 191-193 post), in relation to authentic instruments and court settlements which are not maintenance orders;
- 52 (2) s 5 (as amended) (with a modification), ss 6(3), 7(1), (2), (4), (5), 8, in relation to authentic instruments and court settlements which are maintenance orders;
- 53 (3) s 11 (with a modification), s 48, in relation to authentic instruments and court settlements; and
- 54 (4) the disapplication of s 18 by s 18(7), in relation to authentic instruments and court settlements.

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/B. RECOGNITION AND ENFORCEMENT/188. Objections to recognition based on the jurisdiction of the court of the state in which judgment was obtained.

B. RECOGNITION AND ENFORCEMENT

188. Objections to recognition based on the jurisdiction of the court of the state in which judgment was obtained.

If a judgment¹ falls within the scope of the 'Brussels I' Regulation or the Brussels or Lugano Convention², the defendant may challenge the original exercise of jurisdiction by that court, and call upon the court asked to recognise the judgment to re-examine and to decide for itself whether the court giving judgment had jurisdiction to do so³. The grounds upon which he may do so are exhaustively set out in the Regulation and Conventions⁴.

The defendant may object on the ground that the court which gave judgment took jurisdiction in violation of the provisions giving exclusive jurisdiction to the courts of another contracting state⁵, or in violation of the particular jurisdictional provisions which apply to insurance⁶ and to consumer contracts⁷. Subject to one exception relating to both Conventions⁸, and one relating only to the Lugano Convention⁹, the jurisdiction of the original court may not be reviewed, and, in particular, the test of public policy¹⁰ may not be applied to the rules relating to jurisdiction¹¹. Any non-recognition convention that was undertaken prior to the entry into force of the 'Brussels I' Regulation is left unaffected by the entry into force of the Regulation¹².

1 For the meaning of 'judgment' for these purposes see para 186 ante.

2 As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. See also para 183 ante.

3 In its examination of the grounds of jurisdiction, the court or authority is bound by the findings of fact on which the court of the state of origin based its jurisdiction: 'Brussels I' Regulation art 35 para 2; Brussels Convention art 28, 2nd para; Lugano Convention art 28, 3rd para.

4 See the 'Brussels I' Regulation art 34; the Brussels Convention art 28; the Lugano Convention art 28; and the text and notes infra.

5 I.e. the provisions of Chapter II, Section 6 (art 22) of the 'Brussels I' Regulation or Title II, Section 5 (art 16) of the Conventions (see paras 75-76 ante): 'Brussels I' Regulation art 35 para 1; Brussels Conventions art 28, 1st para; Lugano Convention art 28, 1st para. As to references to numbered articles of the Conventions see para 65 note 8 ante.

6 I.e. the provisions of Chapter II, Section 3 (arts 8-14) of the 'Brussels I' Regulation or Title II, Section 3 (arts 7-12) of the Conventions (see para 80 ante): 'Brussels I' Regulation art 35 para 1; Brussels Convention art 28, 1st para; Lugano Convention art 28, 1st para. It is thought that a judgment from a court before which the defendant entered an appearance does not violate the jurisdictional rules governing insurance contracts: see para 80 note 1 ante.

7 I.e. the provisions of Chapter II, Section 4 (arts 15-17) of the 'Brussels I' Regulation or Title II, Section 3 (arts 13-15) of the Conventions (see para 81 ante): 'Brussels I' Regulation art 35 para 1; Brussels Conventions art 28, 1st para; Lugano Convention art 28, 1st para. It is thought that a judgment from a court before which the defendant entered an appearance does not violate the jurisdictional rules governing consumer contracts: see para 81 note 1 ante.

8 In the case of both Conventions, if:

55 (1) the defendant is domiciled or habitually resident in a non-contracting state; and

- 56 (2) he was not domiciled in any contracting state according to its law (ie the case falls within art 4 of the Conventions (see para 88 ante)); and
- 57 (3) the claim against him fell outside the scope of the exclusive jurisdiction provisions of the Conventions (ie the case is not, by virtue of art 4 of the Conventions, one within art 16 of the Conventions (see paras 75-76 ante)); and
- 58 (4) the jurisdiction of the court which gave judgment could only have been founded upon specified jurisdictional provisions (ie jurisdictional provisions, which may not be applied in the courts of one contracting state against persons domiciled in another, such as are mentioned in art 3 of the Conventions (see para 83 note 12 ante)); and
- 59 (5) there exists a convention between the state addressed and the non-contracting state in which the defendant is domiciled or habitually resident, according to the terms of which the state addressed is obliged not to recognise the judgment,

then the judgment may be denied recognition or enforcement according to that convention: see the Brussels Convention art 59; and the Lugano Convention art 59. As to domicile in a non-contracting state see the Civil Jurisdiction and Judgments Act 1982 s 41(7); and para 88 ante.

In relation to head (1) supra, a contracting state may not assume an obligation towards a third state not to recognise a judgment given in another contracting state by a court basing its jurisdiction on the presence within that state of property belonging to the defendant, or the seizure by the claimant of property situated there, if: (a) the action is brought to assert or declare proprietary or possessory rights in that property, seeks to obtain authority to dispose of it, or arises from another issue relating to such property; or (b) the property constitutes the security for a debt which is the subject-matter of the action: see the Brussels Convention art 59, 2nd para; and the Lugano Convention art 59, 2nd para.

Her Majesty may by Order in Council declare a provision of a convention entered into by the United Kingdom to be a provision whereby the United Kingdom has assumed an obligation of the kind mentioned in head (5) supra: Civil Jurisdiction and Judgments Act 1982 s 9(2). As to the orders that have been made see the Reciprocal Enforcement of Foreign Judgments (Canada) Order 1987, SI 1987/468 (amended by SI 1987/2211; SI 1988/1304; SI 1988/1853; SI 1989/987; SI 1991/1724; SI 1992/1731; SI 1995/2708); and the Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994, SI 1994/1901.

9 Recognition or enforcement may be refused if:

- 60 (1) the ground of jurisdiction on which the judgment is based differs from that resulting from the Lugano Convention, and recognition or enforcement is sought against a party who is domiciled in a contracting state which is not a member of the European Union, unless it may otherwise be recognised or enforced under any rule of law in the state addressed (art 54B para 3); or
- 61 (2) the state addressed is not a party to any other convention affecting recognition or enforcement and the person against whom recognition or enforcement is sought is domiciled in that state, unless the judgment may otherwise be recognised or enforced under any rule of law in the state addressed (art 57 para 4).

10 Ie the test referred to in art 34 para 1 of the 'Brussels I' Regulation and art 27 para 1 of the Conventions: see para 189 post.

11 'Brussels I' Regulation art 35 para 3; Brussels Convention art 28, 3rd para; Lugano Convention art 28, 4th para.

12 'Brussels I' Regulation art 72. Following the entry into force of the Regulation, the adoption of any such agreement falls within the exclusive competence of the European Union rather than individual member states.

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to

European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/B. RECOGNITION AND ENFORCEMENT/189. Non-jurisdictional objections to recognition of a judgment.

189. Non-jurisdictional objections to recognition of a judgment.

The 'Brussels I' Regulation and the Brussels and Lugano Conventions¹ provide that under no circumstances may a judgment² be reviewed as to its substance³, although a judgment may be denied recognition on any of five alternative non-jurisdictional grounds⁴, as described below:

- 142 (1) In the case of the 'Brussels I' Regulation, a judgment must not be recognised if to recognise it would be manifestly contrary to English public policy; and, in the case of the Conventions, a judgment must not be recognised if such recognition is contrary to public policy⁵. The term 'public policy' is to be given a narrow interpretation, although its precise content is likely to be a matter for the national law of the court seised⁶. Although it is open to court to find that a judgment was (or may have been) procured by fraud⁷, the court is not thereby entitled to find that to recognise it would, on that ground alone, be contrary to public policy, for procedures may exist in the state where the judgment originated for the allegation of fraud to be investigated, and, if there are adequate local remedies, recognition may well be found, notwithstanding the allegation of fraud, not to infringe public policy⁸.
- 143 (2) Under the 'Brussels I' Regulation, a judgment must not be recognised if it was given in default of appearance and the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so⁹. The equivalent provision under the Conventions does not have this proviso so a judgment must not be recognised thereunder simply if it was given in default of appearance and the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence¹⁰. Whether a defendant has appeared before the foreign court must be determined by the procedural law of that court¹¹. Whether service was duly made upon him is to be determined by reference to the law of the court in which judgment was obtained, and whose document it was¹², and not by the law of the place in which service was actually made (unless the law of the state of origin regards service as duly made if it complies with the law of the state in which it is actually effected¹³). Whether any irregularity in service can be cured is likewise a matter for the law of the state whose document it was¹⁴. Whether service was made timeously is a matter of fact to be assessed by the court called upon to recognise the judgment; it is not decisive that the court which gave judgment reached the conclusion that the defendant had been served in good time. In making the assessment, the court called upon to consider whether service was timeously made is entitled to consider whether the manner of effecting service should affect the amount of time which the defendant should have been allowed¹⁵; but the length of time is only that needed to prevent a judgment from being entered in default of appearance¹⁶.
- 144 (3) A judgment will not be recognised if it is irreconcilable with a judgment given in a dispute between the same parties in the state in which recognition is sought¹⁷.

The test of irreconcilability is whether the legal consequences are mutually exclusive¹⁸.

145 (4) Under the Brussels and Lugano Conventions, a judgment will not be recognised if the court which gave it, in order to arrive at its judgment, decided, in a way that conflicts with a rule of the private international law of the state in which recognition is sought, a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession, unless the same result would have been reached by applying the rules of private international law of that state¹⁹.

146 (5) A judgment will not be recognised if it is irreconcilable with an earlier judgment given in another Regulation state or in a non-Regulation state or in a non-contracting state involving the same cause of action and between the same parties, provided that this latter judgment fulfils the conditions necessary for recognition in the state in which recognition is sought²⁰.

1 As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. See also para 183 ante.

2 For the meaning of 'judgment' for these purposes see para 186 ante.

3 'Brussels I' Regulation art 36; Brussels Convention art 29; Lugano Convention art 29.

4 'Brussels I' Regulation art 34; Brussels Convention art 27; Lugano Convention art 27.

5 'Brussels I' Regulation art 34 para 1; Brussels Convention art 27 para 1; Lugano Convention art 27 para 1. For these purposes, public policy has a Community meaning and is to be interpreted strictly: Case C-7/98 *Bamberski v Krombach* [2001] QB 709, [2001] All ER (EC) 584, ECJ (judgment to be recognised notwithstanding the failure of the court granting it to comply with the jurisdictional rules of the Brussels Convention). See also Case C-38/98 *Régie Nationale des Usines Renault SA v Maxicar SpA* [2000] ECR I-2973, ECJ (public policy ground may not be used by a court in a Brussels Convention state to refuse recognition to the judgment of a court in another contracting state which, it considers, has misapplied Community law in its judgment). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

6 Its precise content in England is a matter of English law. There is, however, support for the view that the term is to be interpreted narrowly: see *Interdesco SA v Nullifire Ltd* [1992] 1 Lloyd's Rep 180; *Société d'Informatique Service Réalisation Organisation (SISRO) v Ampersand Software BV* [1994] IL Pr 55, CA.

7 See para 151 ante.

8 See the cases cited in note 6 supra. See also the report of Professor Peter Schlosser (OJ C59, 5.3.79, p 71 at 128) on the Convention on the accession to the 1968 Convention and the 1971 Protocol of Denmark, the Republic of Ireland and the United Kingdom, signed at Luxembourg on 9 October 1978 ('the Accession Convention': Civil Jurisdiction and Judgments Act 1982 s 1(1)). Although the court can refuse to recognise a judgment because a party has not had a fair trial, there is a strong presumption that the court procedures of other signatories to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71; Cmd 8969) are compliant with art 6 of that Convention: *Maronier v Larmer* [2002] EWCA Civ 774, [2003] QB 620. See also *SA Marie Brizzard et Roger International v William Grant & Sons Ltd (No 2)* 2002 SLT 1365, OH (violation of appellant's right under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) cured on appeal).

9 'Brussels I' Regulation art 34 para 2. This wording is intended to preclude technical grounds for non-recognition. Under the Conventions, the fact that the defendant would have been entitled, under the law of the court which gave judgment, to apply to have the judgment set aside does not affect the default character of the judgment; and if such an application is made, but is unsuccessful, the judgment may still be treated as a default judgment if the defendant was under a procedural handicap by reason of its having been entered: Case C-123/91 *Minalmet GmbH v Brandeis Ltd* [1992] ECR I-5661, ECJ. See also Case 49/84 *Debaecker and Plouvier v Bouwman* [1985] ECR 1779, ECJ.

As to what constitutes a 'document which instituted the proceedings' see Case C-474/93 *Firma Hengst Import BV v Campese* [1995] IL Pr 587, ECJ. As to what constitutes 'sufficient time' see *TSN Kunststoffrecycling GmbH v Jurgens* [2002] EWCA Civ 11, [2002] 1 All ER (Comm) 282, [2002] 1 WLR 2459 ('sufficient time' was measured from the due service of documents in the proceedings up to the time that the default judgment was issued).

10 Brussels Convention art 27 para 2; Lugano Convention art 27 para 2. As to what constitutes a 'document which instituted the proceedings' and 'sufficient time' see note 9 supra.

11 Matters of procedure are determined by the law of the court seised with the procedural question: see Case 129/83 *Zelger v Salinitri (No 2)* [1984] ECR 2397, [1985] 3 CMLR 366, ECJ. See also *Hendrickman v Magenta Druck* [1997] QB 426, [1996] ECR I-4943, ECJ (where the law of the state of origin allowed proceedings to be initiated against a defendant without his knowledge but with a lawyer appearing on his behalf, albeit without his authority, the judgment was deemed to have been given in default of appearance).

12 Case C-305/88 *Isabelle Lancray SA v Peters und Sickert KG* [1990] ECR I-2725, ECJ; Case C-123/91 *Minalmet GmbH v Brandeis Ltd* [1992] ECR I-5661, ECJ.

13 Case C-123/91 *Minalmet GmbH v Brandeis Ltd* [1992] ECR I-5661, ECJ.

14 *Isabelle Lancray SA v Peters und Sickert KG* [1990] ECR I-2725, ECJ. Under the Conventions, the fact that the defendant may have known of the irregularly-served document is irrelevant: *Isabelle Lancray SA v Peters und Sickert KG* supra. See also Case C-123/91 *Minalmet GmbH v Brandeis Ltd* [1992] ECR I-5661, ECJ.

15 Case 166/80 *Klomps v Michel* [1981] ECR 1593, ECJ; Case 288/81 *Pendy Plastic Products v Pluspunkt* [1982] ECR 2723, ECJ.

16 See the cases cited in note 15 supra.

17 'Brussels I' Regulation art 34 para 3; Brussels Convention art 27 para 3; Lugano Convention art 27 para 3. Such instances should be rare, since most occasions when they might arise would be forestalled by the operation of art 27 of the 'Brussels I' Regulation or art 21 of the Conventions: see para 128 ante. An enforceable settlement between the parties (see para 187 ante) does not constitute a judgment for the purposes of this provision: Case C-414/92 *Solo Kleinmotoren GmbH v Boch* [1994] ECR I-2237, ECJ.

18 Case 145/86 *Hoffman v Krieg* [1988] ECR 645, ECJ. See also *Macaulay v Macaulay* [1991] 1 All ER 865, [1991] 1 WLR 179; *Gascoine v Pyrah* [1994] IL Pr 82, CA. It does not appear that the local judgment is required to have been given first, and it is not clear what the consequences would be if, execution having been commenced upon a judgment of a Regulation state or contracting state, an irreconcilable judgment were subsequently handed down in the state in which recognition is sought. If the judgment of the Regulation state or contracting state were irreconcilable with a judgment which fell outside the scope of the Regulation or the Conventions, it would not be recognised, for to require recognition in such circumstances would be to undermine the 'Brussels I' Regulation art 1 or art 1 of the Conventions: see in particular Case 145/86 *Hoffman v Krieg* supra; Case C-190/89 *Marc Rich & Co AG v Società Italiana Impianti PA* [1991] ECR I-3855, ECJ. For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

19 Brussels Convention art 27 para 4; Lugano Convention art 27 para 4. The 'Brussels I' Regulation contains no analogous provision. See also Case 145/86 *Hoffman v Krieg* [1988] ECR 645, ECJ.

20 'Brussels I' Regulation art 34 para 4; Brussels Convention art 27 para 5; Lugano Convention art 27 para 5. The judgment must have been given, and it is probable that it must already have met the criteria for recognition, when the question of recognition arises. It is not clear what is the precise moment at which the question of recognition will be held to arise, but it may be that it is the date of the judgment in the court which made its order, rather than the (later) date of the proceedings in the English court. As no procedure is required for the recognition of a judgment (see para 191 post) it is arguable that the obligation to grant recognition to the judgment arises as soon as it is handed down by the court. Nevertheless, at the date at which this volume states the law, the position remains unclear, especially where the judgment is itself subject to an appeal. The problem created when judgments from two contracting states conflict has no textual, or otherwise obvious, solution: see the Report on the Lugano Convention by Mr P Jenard and Mr G Möller (OJ C189, 28.7.90, p 57 at 79).

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to

European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/B. RECOGNITION AND ENFORCEMENT/190. Effect of a pending appeal upon the obligation to recognise a judgment.

190. Effect of a pending appeal upon the obligation to recognise a judgment.

A court of a contracting state¹, in which recognition is sought of a judgment² given in another contracting state, may stay the proceedings if an ordinary appeal has been lodged against the judgment and (in the case of a judgment given in the Republic of Ireland or the United Kingdom) if enforcement is suspended in the state of origin by reason of an appeal³.

1 For the meaning of 'contracting state' see para 65 note 5 ante.

2 For the meaning of 'judgment' for these purposes see para 186 ante.

3 'Brussels I' Regulation art 37; Brussels Convention art 30; Lugano Convention art 30. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. See also para 183 ante.

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/B. RECOGNITION AND ENFORCEMENT/191. Procedure for, and effect of, recognition of the judgment.

191. Procedure for, and effect of, recognition of the judgment.

The 'Brussels I' Regulation and the Brussels and Lugano Conventions¹ provide that a judgment² given in a Regulation state or contracting state³ must be recognised in the other contracting states without any special procedure being required⁴, but an interested party who raises the question of recognition of a judgment may apply for a decision that the judgment be recognised⁵. If the outcome of proceedings in a court of a contracting state depends on the determination of an incidental question of recognition, that court has jurisdiction over that question⁶.

The recognition of the judgment is intended to confer upon it the same authority and effectiveness as is accorded to it in the state in which it was given⁷. When recognised, however, a judgment may be used to found an issue or cause of action estoppel, for the doctrine of *res judicata* applies equally to judgments entitled to recognition under the Conventions⁸.

In the United Kingdom where an applicant for registration of a judgment under the 'Brussels I' Regulation or under the Conventions⁹ shows that the judgment provides for the payment of a sum of money and that under the law of the Regulation state or contracting state in which the judgment was given interest is recoverable on it from a particular date or time, the rate of interest and that date or time must be registered with the judgment, and the debt resulting from the registration carries interest in accordance with the registered particulars¹⁰.

1 As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. See also para 183 ante.

2 For the meaning of 'judgment' for these purposes see para 186 ante.

3 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

4 'Brussels I' Regulation art 33 para 1; Brussels Convention art 26, 1st para; Lugano Convention art 26, 1st para.

5 'Brussels I' Regulation art 33 para 2; Brussels Convention art 26, 2nd para; Lugano Convention art 26, 2nd para. The application must be in accordance with Chapter III, Sections 2, 3 (arts 38-52, 53-56) of the 'Brussels I' Regulation and with Title III, Sections 2, 3 (arts 31-45, 46-49) of the Conventions: see paras 192-200 post. As to references to numbered articles of the Conventions see para 65 note 8 ante.

6 'Brussels I' Regulation art 33, para 3; Brussels Convention art 26, 3rd para; Lugano Convention art 26, 3rd para.

7 Case 145/86 *Hoffman v Krieg* [1988] ECR 645, ECJ. See also the report of Mr P Jenard on the 1968 Convention and the 1971 Protocol (OJ C59, 5.3.79, pp 1, 66). It is, however, unclear how this may affect the position of a third party. If the judgment given by a court is one which, according to the law of that state, is binding on a third party who was not party to the proceedings, it is not clear whether it must likewise be recognised as against him in England. As a matter of English common law, such a judgment could not be binding on the third party unless he were privy to one of the parties: see para 150 text and note 5 ante. But cf the report of Professor Peter Schlosser on the Accession Convention (OJ C59, 5.3.79, p 71 at 127-128), concerning a judgment against a debtor which is also binding upon a surety. The obligation to give the judgment the effect it has under the law of the court which handed it down would suggest that it should be recognised; however, a judgment given in default of the appearance of the third party should be denied recognition: see para 189 text and notes 9-16 ante. It is suggested, therefore, that even if the judgment is,

according to the law of the court which rendered it, binding upon certain third parties, the protection afforded by the provisions dealing with default judgments may render it not liable to be recognised as against such third parties. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

8 *Berkeley Administration Inc v McClelland* [1995] IL Pr 201, CA. See also para 129 ante.

9 le (in relation to the Regulation) under the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 para 2 or 3 or (in relation to the Conventions) under the Civil Jurisdiction and Judgments Act 1982 s 4 (as amended) or s 5 (as amended): see paras 192, 335 post.

10 Civil Jurisdiction and Judgments Act 1982 s 7(1); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 5(1). Such judgments may carry interest only as provided under these provisions (whichever applies), with exceptions made relating to maintenance orders (see para 335 note 16 post). This is subject to rules of court (Civil Jurisdiction and Judgments Act 1982 s 7(2); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 5(1)). Under the Civil Jurisdiction and Judgments Act 1982, such rules of court may make provision as to the manner in which and the periods by reference to which interest is to be calculated and paid, including provision for interest to cease to accrue from a prescribed date: s 7(2). At the date at which this volume states the law, no rules of court had been made for this purpose.

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/B. RECOGNITION AND ENFORCEMENT/192. Enforcement of judgments which qualify for recognition: application for registration.

192. Enforcement of judgments which qualify for recognition: application for registration.

A judgment¹ given in a Regulation state or contracting state² and enforceable there is enforceable in England when, on the application of any interested party, it has been registered for enforcement in England³. If the judgment has been given for several matters, but enforcement cannot be authorised for all of them, enforcement may be authorised for one or more of them⁴.

A judgment, other than a maintenance order, registered under the 'Brussels I' Regulation is, for the purposes of its enforcement in England, of the same force and effect, the registering court has the same powers as to enforcement, and proceedings relating to its enforcement may be taken, as if it had originally been made by the registering court and had, where relevant, been entered⁵. The application is made to the High Court⁶. It is made without notice to the party against whom enforcement is sought⁷, and must be supported by written evidence⁸. The judgment is declared enforceable immediately upon completion of the necessary formalities⁹ and without any review of the defences that are available¹⁰. The registration order is then served on the judgment debtor, who may appeal against it¹¹. The applicant may appeal against any refusal to grant a registration order¹².

A judgment, other than a maintenance order¹³, which is the subject of an application under the Brussels or Lugano Convention for enforcement in England must, to the extent that enforcement is authorised by the appropriate court¹⁴, be registered in the prescribed manner in that court¹⁵. A judgment so registered is, for the purposes of its enforcement, of the same force and effect, the registering court has the same powers as to enforcement, and proceedings relating to its enforcement may be taken, as if it had originally been made by the registering court and had, where relevant, been entered¹⁶. The application is made to the High Court¹⁷. It is made without notice to the party against whom enforcement is sought¹⁸, and must be supported by written evidence¹⁹. The court must give a decision which must be made without delay²⁰. The application may be refused only for one of the reasons specified by the Conventions as a reason for non-recognition of a judgment²¹, and under no circumstances may a foreign judgment be reviewed as to its substance²². If the court makes an order for registration, notice of registration must be served on the other party²³, who has a right of appeal²⁴.

1 For the meaning of 'judgment' for these purposes see para 186 ante.

2 For the meaning of 'contracting state' see para 65 note 5 ante.

3 'Brussels I' Regulation art 38 paras 1, 2; Brussels Convention art 31; Lugano Convention art 31. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. See also para 183 ante. Note that, under the Regulation, a judgment given in Regulation states other than the United Kingdom is enforceable in another Regulation state when, on the application of any interested party, it has been declared enforceable there: 'Brussels I' Regulation art 38 para 1. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 'Brussels I' Regulation art 48 para 1; Brussels Convention art 42, 1st para; Lugano Convention art 42, 1st para; cf *Raulin v Fischer* [1911] 2 KB 93. An applicant may request partial enforcement of a judgment: 'Brussels I' Regulation art 48 para 2; Brussels Convention art 42, 2nd para; Lugano Convention art 42, 2nd para.

5 Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 para 2(2). This is subject to the 'Brussels I' Regulation art 47 (see para 194 post), to the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 5 (see para 191 ante) and to any provision made by rules of court as to the manner in which and conditions subject to which a judgment registered under the 'Brussels I' Regulation may be enforced: Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 2(3). Where a judgment is registered under the 'Brussels I' Regulation, the reasonable costs or expenses of or incidental to its registration are recoverable as if they were sums recoverable under the judgment: Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 2(1). Such costs or expenses carry interest as if they were the subject of an order for the payment of costs or expenses made by the registering court on the date of registration: Sch 1 para 5(2). The procedure for making an application for security for the costs is given in CPR 74.5(1) (see para 168 note 6 ante), except that a judgment creditor making an application under the 'Brussels I' Regulation may not be required to give security solely on the ground that he is resident out of the jurisdiction (CPR 74.5(2)). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

6 'Brussels I' Regulation art 39 para 1, Annex II, art 40 para 1; CPR 74.3(2)(a). The local jurisdiction is determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement: 'Brussels I' Regulation art 39 para 2.

7 'Brussels I' Regulation art 41; CPR 74.3(2)(b). When a judgment is recognised in accordance with the 'Brussels I' Regulation, nothing prevents the applicant from availing himself of provisional, including protective, measures in accordance with the law of the member state requested without a declaration of enforceability under art 41 being required: art 47 para 1.

8 See the 'Brussels I' Regulation arts 53, 54. An application for registration under the Regulation, in addition to the evidence required by the Regulation: (1) must be supported by written evidence exhibiting, where the judgment is not in English, a translation of it into English certified by a notary public or other qualified person or accompanied by written evidence confirming that the translation is accurate; and (2) must state, where interest is recoverable on the judgment under the law of the state of origin, the amount of interest which has accrued up to the date of the application, or the rate of interest, the date from which it is recoverable, and the date on which it ceases to accrue: CPR 74.4(6). For the meanings of 'judgment' and 'state of origin' for these purposes see para 166 note 7 ante.

An application for a certified copy of a judgment under the 'Brussels I' Regulation art 54 is made to the High Court or to a county court in accordance with CPR 74.12-74.13 (see para 170 note 6 ante), which is expressed to apply only to the High Court, for the purposes of the Administration of Justice Act 1920 s 10. The court may, if the prescribed documents are not produced, specify a time for production, accept equivalent documents or, if it considers that it already has sufficient information before it, dispense with their production, and may also require a translation of documents: 'Brussels I' Regulation art 55. No other formality may be required in respect of documents: art 56. A certificate obtained in accordance with art 54 and Annex V of the 'Brussels I' Regulation is evidence in the United Kingdom that the judgment is enforceable in the Regulation state of origin of any matter to which it relates: Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 8(1)(b). For the meaning of 'United Kingdom' see para 4 ante.

9 Ie the formalities contained in the 'Brussels I' Regulation art 53: see note 8 supra. The registration of a judgment serves as a decision that the judgment is recognised for the purposes of the 'Brussels I' Regulation: CPR 74.10(1).

10 'Brussels I' Regulation art 41. Defences are available under arts 34 and 35: see paras 188-189 ante.

11 Ibid art 42 para 2, art 43 para 1. The procedure in relation to registration orders is governed by CPR 74.6 (see para 167 note 13 ante), with the modification that the registration order must state the right of the judgment debtor to appeal against the registration order (CPR 74.6(3)(c)).

12 'Brussels I' Regulation art 43 para 1; CPR 74.8(1). See para 193 post.

13 As to the registration of maintenance orders under the 'Brussels I' Regulation and under the Civil Jurisdiction and Judgments Act 1982 see para 335 post.

14 'Appropriate court' means the court to which the application is made in pursuance of art 32 of the Conventions, ie the High Court: Civil Jurisdiction and Judgments Act 1982 s 4(1). As to references to numbered articles of the Conventions see para 65 note 8 ante.

15 Civil Jurisdiction and Judgments Act 1982 s 4(1) (amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 2 para 2). The prescribed manner of registration is given in CPR 74.4(1)-(2) (see para 166 note 7 ante), except that written evidence in support of an application under the Civil Jurisdiction and Judgments Act 1982 s 4 must also exhibit:

- 62 (1) documents which show that, under the law of the state of origin, the judgment is enforceable on the judgment debtor and has been served (CPR 74.4(5)(a));
- 63 (2) in the case of a judgment in default, a document which establishes that the party in default was served with the document instituting the proceedings or with an equivalent document (CPR 74.4(5)(b)); and
- 64 (3) where appropriate, a document showing that the judgment creditor is in receipt of legal aid in the state of origin (CPR 74.4(5)(c)).

For the meanings of 'judgment' and 'state of origin' for these purposes see para 166 note 7 ante.

Registration of a judgment serves as a decision that the judgment is recognised for the purposes of the Civil Jurisdiction and Judgments Act 1982: CPR 74.10(1). An application for recognition of a judgment is governed by the same rules as an application for registration of a judgment under the Civil Jurisdiction and Judgments Act 1982 (or under the 'Brussels I' Regulation: see note 9 supra), except that CPR 74.4(5)(a) (see head (1) supra) and CPR 74.4(5)(c) (see head (3) supra) do not apply: CPR 74.10(2).

Where a judgment is registered under the Civil Jurisdiction and Judgments Act 1982, the reasonable costs or expenses of or incidental to its registration are recoverable as if they were sums recoverable under the judgment: s 4(2). Such costs or expenses carry interest as if they were the subject of an order for the payment of costs or expenses made by the registering court on the date of registration: s 7(3). The procedure for making an application for security for the costs is given in CPR 74.5(1) (see para 168 note 6 ante), except that a judgment creditor making an application under the Civil Jurisdiction and Judgments Act 1982 may not be required to give security solely on the ground that he is resident out of the jurisdiction (CPR 74.5(2)).

See also *Practice Direction--Enforcement of Judgments in Different Jurisdictions* PD74.

16 Civil Jurisdiction and Judgments Act 1982 s 4(3). This is subject to art 39 of the Conventions (see para 194 post), to the Civil Jurisdiction and Judgments Act 1982 s 7 (see para 191 ante) and to any provision made by rules of court as to the manner in which and conditions subject to which a judgment so registered may be enforced: s 4(4).

17 Brussels Convention arts 32, 33; Lugano Convention arts 32, 33; CPR 74.3(2)(a).

18 Brussels Convention art 34, 1st para; Lugano Convention art 34, 1st para; CPR 74.3(2)(b).

19 Brussels Convention arts 46, 47; Lugano Convention arts 46, 47. The court may, if the prescribed documents are not produced, specify a time for production, accept equivalent documents or, if it considers that it already has sufficient information before it, dispense with their production, and may also require a translation of documents: Brussels Convention art 48; Lugano Convention art 48. No other formality may be required in respect of documents: Brussels Convention art 49; Lugano Convention art 49. The original or a copy of any such document as is required under the Conventions is evidence in the United Kingdom of any matter to which it relates: Civil Jurisdiction and Judgments Act 1982 s 11(1)(b). See also note 15 supra.

20 Brussels Convention art 34, 1st para; Lugano Convention art 34, 1st para.

21 Brussels Convention art 34, 2nd para; Lugano Convention art 34, 2nd para. See also arts 27, 28 of the Conventions; and paras 188-189 ante.

22 Brussels Convention art 34, 3rd para; Lugano Convention art 34, 3rd para.

23 Brussels Convention art 35; Lugano Convention art 35. Note that art 35 of the Conventions provides for the decision to be brought 'to the notice of the applicant'; it is thought that this should refer rather to the party against whom enforcement is sought, who was not entitled to be heard on the application, but who subsequently has a right of appeal (see the text and note 24 infra).

24 See the Brussels Convention art 36; the Lugano Convention art 36; and see para 193 post. The procedure in relation to registration orders following an application under the Civil Jurisdiction and Judgments Act 1982 s 4 (see notes 13-16 supra) is governed by CPR 74.6 (see para 167 note 13 ante), with the modification that the registration order must state the right of the judgment debtor to appeal against the registration order (CPR 74.6(3)(c)). Note, however, that under the 'Brussels I' Regulation a distinction is made between the application for a declaration of enforceability being brought to the notice of the applicant (art 42 para 1) and the declaration of enforceability being served on the party against whom enforcement is sought (art 42 para 2).

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

192 Enforcement of judgments which qualify for recognition: application for registration

NOTE 3--A defendant can only bring proceedings to challenge a default judgment made against him where he has had the opportunity to acquaint himself with the contents of the default judgment: Case C-283/05 *ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS)* [2007] 1 All ER (Comm) 949, ECJ. A judgment by the Cypriot courts in respect of land situated in northern Cyprus is enforceable for the purposes of art 38(1), even though the government does not exercise effective control over that area: Case C-420/07 *Apostolides v Orams* (2009) Times, 1 May, ECJ. See also *Haji-Ioannou v Frangos* [2009] EWHC 2310 (QB), [2009] WTLR 1747, [2009] All ER (D) 121 (Sep).

NOTE 21--A defendant can only bring proceedings to challenge a default judgment made against him where he has had the opportunity to acquaint himself with the contents of the default judgment: Case C-283/05 *ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS)* [2007] 1 All ER (Comm) 949, ECJ.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/B. RECOGNITION AND ENFORCEMENT/193. Appeal against registration order; further appeal.

193. Appeal against registration order; further appeal.

An appeal by the judgment debtor against the registration of a judgment¹ is made to the High Court². The appellant has one month from the date on which the notice of registration was served upon him (or two months if he is not domiciled in the United Kingdom) to appeal against the order for registration³. Where the appeal is against the refusal of registration, the appellant has one month only from the date of the decision on the application for registration⁴.

After the determination of such an appeal, the unsuccessful party (whichever it is) may make a single further appeal upon a point of law⁵.

In the case of an appeal under the 'Brussels I' Regulation⁶, the court may only refuse or revoke recognition for one of the reasons specified by the Regulation as a reason for non-recognition⁷; and it must give its decision without delay⁸. Under no circumstances may the foreign judgment be reviewed as to its substance⁹.

1 For the meaning of 'judgment' for these purposes see para 186 ante.

2 'Brussels I' Regulation art 43 paras 1-3; Brussels Convention art 37 para 1; Lugano Convention art 37 para 1; CPR 74.8(1). Subject to the provisions of CPR Pt 74, the appeal must be made in accordance with CPR Pt 52 (see CIVIL PROCEDURE vol 12 (2009) PARA 1658 et seq): CPR 74.8(1). Permission is not required to appeal or to put in evidence: CPR 74.8(2). As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. See also para 183 ante.

3 'Brussels I' Regulation art 43 para 5; Brussels Convention art 36; Lugano Convention art 36; CPR 74.8(4) (a). The court may extend the period for filing an appellant's notice against the order granting registration if: (1) the judgment debtor is not domiciled within a Regulation state or a contracting state (as the case may be); and (2) an application to extend the time for appealing is made within two months of service of the registration order, although such an extension may not be granted on grounds of distance: CPR 74.8(3).

For these purposes, 'domicile' is to be determined:

65 (a) in an application under the Civil Jurisdiction and Judgments Act 1982 (see note 5 *infra*), in accordance with ss 41-46 (see para 84 et seq ante) (CPR 74.2(2)(a)); or

66 (b) in an application under the 'Brussels I' Regulation, in accordance with the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 paras 9-12 (see para 84 et seq ante) (CPR 74.2(2)(b)).

'Contracting state' has the meaning given in the Civil Jurisdiction and Judgments Act 1982 s 1(3) (see para 65 note 5 ante): CPR 74.2(1)(a). 'Regulation state' has the same meaning as 'member state' in the 'Brussels I' Regulation, ie all member states except Denmark (see para 65 note 6 ante): CPR 74.2(1)(b). For the meaning of 'United Kingdom' see para 4 ante.

The grounds of appeal are not specified, but they must be taken to be the same as the grounds on which the court might have refused registration, and upon which the appellant would have had no previous opportunity to make submissions: see para 192 text and notes 18, 23 ante. Thus the grounds of appeal would be that:

67 (i) the judgment does not fall within the scope of the 'Brussels I' Regulation or the Convention (see para 184 ante); or

68 (ii) that one or more of the specific grounds upon which its recognition may be opposed are applicable (see paras 188-189 ante).

4 CPR 74.8(4)(b). As to the right of appeal against the refusal of registration see para 192 note 12 ante.

5 'Brussels I' Regulation art 44; Brussels Convention art 37 para 2; Lugano Convention art 37 para 2. In England, the appeal lies to the Court of Appeal or the House of Lords: see the Civil Jurisdiction and Judgments Act 1982 s 6(1), (2) (s 6(1) amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 2 para 3); and the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 4(1), (2). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

6 Ie whether an appeal is lodged under the 'Brussels I' Regulation art 43 or art 44.

7 Ie under the defences allowed which are specified in ibid arts 34 and 35: see paras 188-189 ante. These defences are invoked at an earlier stage under the Conventions: see para 192 ante.

8 'Brussels I' Regulation art 45 para 1.

9 Ibid art 45 para 2.

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

193 Appeal against registration order; further appeal

NOTE 3--'Regulation state' means a member state and now includes Denmark: 1982 Act s 1(3) (amended by SI 2007/1655).

NOTE 5--1982 Act s 6(1) further amended: Constitutional Reform Act 2005 Sch 9 para 39 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/B. RECOGNITION AND ENFORCEMENT/194. Measures pending the determination of the appeal.

194. Measures pending the determination of the appeal.

If the judgment debtor appeals against the order for registration under the Brussels or Lugano Convention¹, he is entitled to apply to the court for a stay of the proceedings on the ground that:

- 147 (1) an appeal has been lodged against the judgment; or
- 148 (2) the time for lodging such an appeal has not yet expired².

Under the 'Brussels I' Regulation, either party to an appeal may make such an application³. The court may also make enforcement conditional upon the provision of security⁴.

Until the determination of the appeal against registration, no measures of execution, other than protective measures, may be taken against the judgment debtor, but the decision to authorise enforcement carries with it the power to proceed to any such protective measures against the property of the judgment debtor⁵.

1 See para 193 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. See also para 183 ante.

2 'Brussels I' Regulation art 46 para 1; Brussels Convention art 38, 1st para; Lugano Convention art 38, 1st para. Under the 'Brussels I' Regulation, and in the case of head (2) in the text, the court may specify the time within which such an appeal must be lodged: art 46 para 1. As to the 'Brussels I' Regulation see para 65 note 1 ante. See also para 183 ante. It is not clear whether a court can order a stay on the ground that an appeal is pending in the state of origin of the judgment, even though there are no longer proceedings in relation to enforcement in the English court, all appeals having been determined: see *Société d'Informatique Service Réalisation Organisation (SISRO) v Ampersand Software BV* [1994] IL Pr 55, CA; and see the proceedings in the European Court, Case C-432/93 *Société d'Information Service Réalisation Organisation (SISRO) v Ampersand Software BV* [1995] All ER (EC) 783, ECJ. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. Any form of appeal available in the United Kingdom is treated as an appeal for this purpose: 'Brussels I' Regulation art 46 para 2; Brussels Convention art 38, 2nd para; Lugano Convention art 38, 2nd para. A decision of a court to lift or refuse a stay cannot be contested by appeal on point of law under art 44 of the 'Brussels I' Regulation or art 37 para 2 of the Conventions (see para 193 ante), and therefore the court does not have jurisdiction to impose or reimpose a stay in these circumstances under art 46 of the 'Brussels I' Regulation or under art 38 of the Conventions: Case C-432/93 *Société d'Information Service Réalisation Organisation (SISRO) v Ampersand Software BV* supra.

3 'Brussels I' Regulation art 46 para 1. An appeal may be lodged by either party under either art 43 or art 44: see para 193 ante.

4 'Brussels I' Regulation art 46 para 3; Brussels Convention art 38, 3rd para; Lugano Convention art 38, 3rd para. See *Petereit v Babcock International Ltd* [1990] 2 All ER 135, [1990] 1 WLR 350; *Société d'Informatique Service Réalisation Organisation (SISRO) v Ampersand Software BV* [1994] IL Pr 55, CA.

5 'Brussels I' Regulation art 47 paras 2, 3; Brussels Convention art 39; Lugano Convention art 39. As to the procedure for enforcement see CPR 74.9; and para 168 note 3 ante.

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/B. RECOGNITION AND ENFORCEMENT/195. Appeal against refusal to order registration; further appeal.

195. Appeal against refusal to order registration; further appeal.

If the court refused to make an order for registration of the judgment¹, the applicant may appeal to the High Court within one month of the decision on the application for registration². The party against whom enforcement is sought must be summoned to appear before the court³.

After the determination of such an appeal, the unsuccessful party (whichever it is) may make a single further appeal upon a point of law⁴.

1 See para 192 ante.

2 'Brussels I' Regulation art 43 paras 1, 2; Brussels Convention art 40 para 1; Lugano Convention art 40 para 1; CPR 74.8(4)(b). As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. See also para 183 ante.

3 'Brussels I' Regulation art 43 para 4; Brussels Convention art 40 para 2; Lugano Convention art 40 para 2. If the party fails to appear, the provisions set out in para 127 text and note 5 ante apply.

4 See the 'Brussels I' Regulation art 44; and the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 para 4. See also the Brussels Convention art 41; the Lugano Convention art 41; and the Civil Jurisdiction and Judgments Act 1982 s 6 (amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 2 para 3). In England, the appeal lies to the Court of Appeal or the House of Lords: Civil Jurisdiction and Judgments Act 1982 s 6; Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 4(1)(a). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

195 Appeal against refusal to order registration; further appeal

NOTE 4--SI 2001/3929 Sch 1 para 4 amended: SI 2009/871. Civil Jurisdiction and Judgments Act 1982 s 6 further amended: Constitutional Reform Act 2005 Sch 9 para 39 (in force 1 October 2009: SI 2009/1604); SI 2009/871.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/C. MISCELLANEOUS PROVISIONS/196. Periodic payments by way of penalty.

C. MISCELLANEOUS PROVISIONS

196. Periodic payments by way of penalty.

A foreign judgment¹ which orders a periodic payment by way of a penalty is enforceable in the state in which enforcement is sought only if the amount of the payment has been finally determined by the courts of the state of origin².

1 For the meaning of 'judgment' for these purposes see para 186 ante.

2 'Brussels I' Regulation art 49; Brussels Convention art 43; Lugano Convention art 43. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. See also para 183 ante.

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/C. MISCELLANEOUS PROVISIONS/197. Legal aid.

197. Legal aid.

An applicant who, in the state of origin, has benefited from complete or partial legal aid or exemption from costs or expenses, is entitled in relation to proceedings involving the enforcement of a foreign judgment¹ to benefit from the most favourable legal aid or the most extensive exemption from costs provided for by the law of the state addressed².

1 For the meaning of 'judgment' for these purposes see para 186 ante.

2 'Brussels I' Regulation art 50; Brussels Convention art 44, 1st para; Lugano Convention art 44, 1st para. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. See also para 183 ante. Article 44, 2nd para of the Conventions contains an exception relating to the enforcement of decisions given by an administrative authority in Denmark or Iceland in respect of a maintenance order. The Lord Chancellor has power, by order, to modify legal aid provisions so as to give effect to international agreements: Access to Justice Act 1999 s 19(2). As to the order that has been see the Community Legal Service (Funding) Order 2000, SI 2000/627. As to the availability of legal aid in proceedings in England see LEGAL AID. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

197 Legal aid

NOTE 2--SI 2000/627 replaced: Community Legal Service (Funding) Order 2007, SI 2007/2441 (amended by SI 2008/1328, SI 2008/2704).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/C. MISCELLANEOUS PROVISIONS/198. Security for enforcement.

198. Security for enforcement.

No security, bond or deposit, however described, may be required of a party who in one Regulation state or contracting state¹ applies for enforcement of a judgment² given in another Regulation state or contracting state on the ground that he is a foreign national or that he is not domiciled or resident in the state in which enforcement is sought³.

1 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

2 For the meaning of 'judgment' for these purposes see para 186 ante.

3 'Brussels I' Regulation art 51; Brussels Convention art 45; Lugano Convention art 45. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. See also para 183 ante.

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/C. MISCELLANEOUS PROVISIONS/199. Proof of admissibility of judgments and documents.

199. Proof of admissibility of judgments and documents.

For the purposes of the 'Brussels I' Regulation and the Brussels and Lugano Conventions¹, a document, duly authenticated², purporting to be a copy of a judgment³ given by a court of a contracting state⁴ other than the United Kingdom⁵ must be deemed without further proof to be a true copy, unless the contrary is shown⁶.

1 As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. See also para 183 ante.

2 A document purporting to be a copy of a judgment given by any such court as is mentioned in the text is duly authenticated for this purpose if it purports to bear the seal of that court or to be certified by any person in his capacity as judge or officer of that court to be a true copy of a judgment given by that court: Civil Jurisdiction and Judgments Act 1982 s 11(2); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 para 8(2).

3 For the meaning of 'judgment' for these purposes see para 186 ante.

4 For the meaning of 'contracting state' see para 65 note 5 ante.

5 For the meaning of 'United Kingdom' see para 4 ante.

6 Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 8(1)(a); Civil Jurisdiction and Judgments Act 1982 s 11(1)(a) (s 11(1) amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 2 para 6). See also para 192 note 19 ante. Nothing in the Civil Jurisdiction and Judgments Act 1982 s 11 (as amended) prejudices the admission in evidence of any document which is otherwise admissible: s 11(3). Nor does anything in the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 8 prejudice the admission in evidence of any document which is otherwise admissible: Sch 1 para 8(3).

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/C. MISCELLANEOUS PROVISIONS/200. Copies of and certificates as to United Kingdom judgments.

200. Copies of and certificates as to United Kingdom judgments.

Provision may be made by rules of court to enable any interested party wishing to secure under the Brussels or Lugano Convention¹ the recognition in another contracting state² of a judgment³ given by a court in the United Kingdom⁴ to obtain a copy of the judgment and a certificate giving particulars relating to the judgment and the proceedings in which it was given⁵.

1 As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. See also para 183 ante.

2 For the meaning of 'contracting state' see para 65 note 5 ante.

3 For the meaning of 'judgment' for these purposes see para 186 ante.

4 For the meaning of 'United Kingdom' see para 4 ante.

5 Civil Jurisdiction and Judgments Act 1982 s 12. As to the procedure see CPR 74.12-74.13; and para 170 note 6 ante. However, note that applications may also be made under the Civil Jurisdiction and Judgments Act 1982 s 12 to a county court. See also the Magistrates' Courts (Civil Jurisdiction and Judgments Act 1982) Rules 1986, SI 1986/1962, r 12 (amended by SI 2001/615; SI 2002/194). As to applications for a certified copy of a judgment under the 'Brussels I' Regulation art 54 see para 192 note 8 ante.

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

200 Copies of and certificates as to United Kingdom judgments

NOTE 5--SI 1986/1962 r 12 further amended: SI 2005/617.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(3) ENFORCEMENT OF FOREIGN JUDGMENTS BY REGISTRATION PURSUANT TO STATUTE/(iii) Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/C. MISCELLANEOUS PROVISIONS/200A. European orders for payment and the European Small Claims Procedure.

200A. European orders for payment and the European Small Claims Procedure.

As an alternative to the procedures existing under the laws of member states, European Parliament and EC Council Regulation 1896/2006 makes provision for European orders for payment, which concern uncontested pecuniary claims, and European Parliament and EC Council Regulation 861/2007 makes provision for the European Small Claims Procedure. Both Regulations are designed to simplify, speed up and reduce the costs of litigation in cross-border cases, and apply to member states other than Denmark.

CPR Pt 78 (added by SI 2008/2178) sets out rules which apply to applications for European orders for payment and other related proceedings and to the European Small Claims Procedure. In relation to applications for European orders for payment, provision is made relating to the applicability of CPR 32.14 in relation to declarations containing deliberate false statements (CPR 78.3), withdrawal of applications (CPR 78.4), the treatment of applications which have been opposed as claims under CPR Pt 7 (CPR 78.5-78.7), review of applications in exceptional cases (CPR 78.8), and enforcement of European orders for payment (CPR 78.9-78.11). In relation to European Small Claims Procedure claims, provision is made relating to filing of claims (CPR 78.13), the allocation of claims to the small claims track (CPR 78.14), transfer of proceedings which are outside the scope of Regulation 861/2007 or which exceed the specified limits (CPR 78.15, CPR 78.17, CPR 78.18), the applicability of CPR 32.14 in relation to declarations containing deliberate false statements (CPR 78.16), review of judgments (CPR 78.19), and enforcement of European Small Claims Procedure claim judgments (CPR 78.20-78.22). The county court has jurisdiction in relation to Regulation 1896/2006 and Regulation 861/2007: High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(1)(q), (r) (added by SI 2008/2934).

UPDATE

183-200 Recognition and Enforcement under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

CPR Pt 78 provides procedural rules relating to applications for European orders for payment and other related proceedings pursuant to European Parliament and EC Council Regulation 1896/2006 and the European Small Claims Procedure pursuant to European Parliament and EC Council Regulation 861/2007: see CIVIL PROCEDURE vol 12 (2009) PARAS 1647-1656.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(4) ENFORCEMENT OF UNITED KINGDOM JUDGMENTS BETWEEN DIFFERENT PARTS OF THE UNITED KINGDOM OR IN FOREIGN COUNTRIES/201. Enforcement of United Kingdom judgments by registration: money and non-money provisions.

(4) ENFORCEMENT OF UNITED KINGDOM JUDGMENTS BETWEEN DIFFERENT PARTS OF THE UNITED KINGDOM OR IN FOREIGN COUNTRIES

201. Enforcement of United Kingdom judgments by registration: money and non-money provisions.

The rules and procedure governing the recognition in England¹ of both money and non-money provisions in other United Kingdom judgments are contained in statute².

Subject to certain exceptions³, an interested party who wishes to secure the enforcement in another part of the United Kingdom of any money provisions⁴ or non-money provisions⁵ contained in a judgment⁶ may apply for a certificate (in the case of money provisions)⁷ or a certified copy of the relevant judgment (in the case of non-money provisions)⁸ to the proper officer of the original court⁹. The original court is:

- 149 (1) in relation to any judgment or order (however named) given or made by a court of law in the United Kingdom, the court by which the judgment or order was given or made¹⁰;
- 150 (2) in relation to a judgment or order not included in head (1) above which has been entered in England, Wales or Northern Ireland in the High Court or a county court, the court in which the judgment or order is entered¹¹;
- 151 (3) in relation to any award or order made by a tribunal in any part of the United Kingdom which is enforceable in that part without an order of a court of law, the tribunal by which the award or order was made¹²;
- 152 (4) in relation to an arbitration award which has become enforceable in the part of the United Kingdom in which it was given in the same manner as a judgment given by a court of law in that part, the court which gave the judgment or made the order by virtue of which that award has thereby become enforceable¹³.

With the exception of an order relating to fines for contempt of court and forfeiture of recognisances which is enforceable in the same manner as a judgment of the High Court in England¹⁴, the enforcement provisions described above do not apply to:

- 153 (a) a judgment given in proceedings in a magistrates' court in England, Wales or Northern Ireland¹⁵; or
- 154 (b) a judgment given in proceedings other than civil proceedings¹⁶; or
- 155 (c) certain judgments given in exercise of jurisdiction in relation to insolvency law¹⁷; or
- 156 (d) a judgment given in proceedings relating to the obtaining of title to administer the estate of a deceased person¹⁸; or
- 157 (e) the enforcement in Scotland of orders made by the High Court or a county court in England or Wales under or for the purposes of Part VI of the Criminal Justice Act 1988¹⁹ or the Drug Trafficking Act 1994²⁰; or

158 (f) as respects the enforcement in England or Wales of orders made by the Court of Session or by the sheriff under or for the purposes of the Proceeds of Crime (Scotland) Act 1995²¹.

The enforcement provisions described above do not apply to as much of any judgment²² as:

- 159 (i) is an order²³ for whose enforcement in another part of the United Kingdom provision is made under Part II of the Maintenance Orders Act 1950²⁴; or
- 160 (ii) concerns the status or legal capacity of an individual²⁵; or
- 161 (iii) relates to the management of the affairs of a person not capable of managing his own affairs²⁶; or
- 162 (iv) is a provisional (including protective) measure other than an order for the making of an interim payment²⁷.

Nor do they apply to a judgment of a court outside the United Kingdom which falls to be treated for the purposes of its enforcement as a judgment of a court of law in the United Kingdom by virtue of its registration under specified statutory provisions²⁸.

No judgment to which these provisions apply and which does not fall within one of the exceptions described above, other than an arbitration award which has become enforceable in the part of the United Kingdom in which it was given in the same manner as a judgment given by a court of law in that part²⁹, may be enforced in another part of the United Kingdom except by registration under the Civil Jurisdiction and Judgments Act 1982³⁰.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See the Civil Jurisdiction and Judgments Act 1982 s 18 (as amended), s 19. It is not possible to enforce a judgment to which the statutory scheme applies by any other method: s 18(8). See the text and note 30 infra. As to arbitration awards see para 205 text and note 8 post. For the meaning of 'United Kingdom' see para 4 ante.

3 See *ibid* s 18(3) (as amended), (4A) (as added and substituted), (5), (6) (as amended), (7).

4 'Money provision' means a provision for the payment of one or more sums of money: *ibid* s 18(1)(a), Sch 6 para 1.

5 'Non-money provision' means a provision for any relief or remedy not requiring payment of a sum of money: *ibid* s 18(1)(b), Sch 7 para 1.

6 For these purposes, 'judgment' means any judgment to which *ibid* s 18 applies (see the text and notes 10 - 13 infra), and references to the giving of a judgment must be construed accordingly: Sch 6 para 1, Sch 7 para 1; and see the text and note 28 infra.

7 *Ibid* Sch 6 para 2(1). An application under Sch 6 para 2 for a certificate to enable the money provisions of a judgment of the High Court or of a county court to be enforced in another part of the United Kingdom may be made by the judgment creditor filing at the court where the judgment was given or has been entered written evidence stating: (1) the name and address of the judgment creditor and, if known, of the judgment debtor; (2) the sums payable and unsatisfied under the money provisions of the judgment; (3) where interest is recoverable on the judgment, either the amount of interest which has accrued up to the date of the application or the rate of interest, the date from which it is recoverable, and the date on which it ceases to accrue; (4) that the judgment is not stayed; (5) the date on which the time for appealing expired or will expire; (6) whether an appeal notice has been filed; (7) the status of any application for permission to appeal; and (8) whether an appeal is pending: CPR 74.17(1), (2). For this purpose, 'money provision' means a provision for the payment of one or more sums of money in a judgment whose enforcement is governed by the Civil Jurisdiction and Judgments Act 1982 s 18, Sch 6: CPR 74.14(a).

8 Civil Jurisdiction and Judgments Act 1982 Sch 7 para 2(1). An application made under Sch 7 para 2 for a certified copy of a judgment of the High Court or of a county court to which s 18 applies and which contains non-money provisions for enforcement in another part of the United Kingdom may be made without notice: CPR 74.18(1), (2). The applicant may apply for a certified copy of a judgment by filing at the court where the judgment was given or has been entered written evidence stating: (1) full particulars of the judgment; (2) the

name and address of the judgment creditor and, if known, of the judgment debtor; (3) that the judgment is not stayed; (4) the date on which the time for appealing expired or will expire; (5) whether an appeal notice has been filed; (6) the status of any application for permission to appeal; and (7) whether an appeal is pending: CPR 74.18(3). For this purpose, 'non-money provision' means a provision for any relief or remedy not requiring payment of a sum of money in a judgment whose enforcement is governed by the Civil Jurisdiction and Judgments Act 1982 s 18, Sch 7: CPR 74.14(b).

9 Civil Jurisdiction and Judgments Act 1982 Sch 6 para 2(2), Sch 7 para 2(2).

10 Ibid s 18(2)(a), Sch 6 para 2(2)(a), Sch 7 para 2(2)(a).

11 Ibid s 18(2)(b), Sch 6 para 2(2)(b), Sch 7 para 2(2)(b).

12 Ibid s 18(2)(d), Sch 6 para 2(2)(d), Sch 7 para 2(2)(d).

13 Ibid s 18(2)(e), Sch 6 para 2(2)(e), Sch 7 para 2(2)(e).

14 Ie by virtue of the Contempt of Court Act 1981 s 16 (as amended) (see CONTEMPT OF COURT vol 9(1) (Reissue) paras 504, 508) or the Supreme Court Act 1981 s 140 (see CIVIL PROCEDURE vol 12 (2009) PARA 1512): Civil Jurisdiction and Judgments Act 1982 s 18(4)(b).

15 Ibid s 18(3)(a).

16 Ibid s 18(3)(b).

17 Ie within the meaning of the Insolvency Act 1986 s 426 (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 728): Civil Jurisdiction and Judgments Act s 18(3)(ba) (added by the Insolvency Act 1985 s 235(1), Sch 8; and amended by the Insolvency Act 1986 s 439(2), Sch 14).

18 Civil Jurisdiction and Judgments Act 1982 s 18(3)(c) (amended by the Insolvency Act 1985 s 235(3), Sch 10 Pt IV).

19 Ie the Criminal Justice Act 1988 Pt VI (ss 71-103) (as amended): Civil Jurisdiction and Judgments Act 1982 s 18(4A)(a) (s 18(4A) added by the Drug Trafficking Offences Act 1986 s 39(4); and substituted by the Drug Trafficking Act 1994 s 65(1), Sch 1 para 6).

20 Civil Jurisdiction and Judgments Act 1982 s 18(4A)(a) (as added and substituted: see note 19 supra).

21 Ibid s 18(4A)(b) (s 18(4A) as added and substituted (see note 19 supra); s 18(4A)(b) amended by the Criminal Justice (Scotland) Act 1995 s 117, Sch 8 para 183; and the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 s 5, Sch 4 para 42).

22 Except where otherwise stated references to a judgment to which the Civil Jurisdiction and Judgments Act 1982 s 18 applies are to such a judgment exclusive of such provisions: s 18(5).

23 Ie an order to which the Maintenance Orders Act 1950 s 16 (as amended) (see para 293 post) applies: Civil Jurisdiction and Judgments Act 1982 s 18(5)(a).

24 Ie the Maintenance Orders Act 1950 Pt III (ss 16-25) (as amended) (see paras 293-295 ante): Civil Jurisdiction and Judgments Act 1982 s 18(5)(a).

25 Ibid s 18(5)(b). A decree of judicial separation or of separation and any order which is a Part I order for the purposes of the Family Law Act 1986 (see para 266 post) are within this provision, though without prejudice to its generality: Civil Jurisdiction and Judgments Act 1982 s 18(6)(a), s 18(6)(b) (substituted by the Courts and Legal Services Act 1990 s 116, Sch 16 para 41).

26 Civil Jurisdiction and Judgments Act 1982 s 18(5)(c).

27 Ibid s 18(5)(d).

28 Ie the Administration of Justice Act 1920 Pt II (ss 9-13) (as amended) (see paras 166-170 ante); the Foreign Judgments (Reciprocal Enforcement) Act 1933 Pt I (ss 1-7) (as amended) (see paras 171-182 ante); the Maintenance Orders (Reciprocal Enforcement) Act 1972 Pt I (ss 1-24) (as amended) (see paras 310-322 post); the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 paras 3, 4; and the Civil Jurisdiction and Judgments Act 1982 ss 4, 5 (both as amended) (see paras 192 ante, 335 post): s 18(7).

29 Ie an award of the kind described in ibid s 18(2)(e): see the text to note 13 supra.

30 le under ibid Sch 6 or Sch 7: s 18(8).

UPDATE

201 Enforcement of United Kingdom judgments by registration: money and non-money provisions

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 6--'Judgment' also means an order made, or a warrant issued, under the Proceeds of Crime Act 2002 Pt 8 (ss 341-416) for the purposes of a civil recovery investigation or a detained cash investigation within the meanings given by s 341 (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(2) (2006 Reissue) PARA 804): Civil Jurisdiction and Judgments Act 1982 s 18(2)(f) (added by SI 2003/425; and amended by Serious Crime Act 2007 Sch 10 para 26).

NOTE 14--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(4) ENFORCEMENT OF UNITED KINGDOM JUDGMENTS BETWEEN DIFFERENT PARTS OF THE UNITED KINGDOM OR IN FOREIGN COUNTRIES/202. Registration of certificates: money provisions.

202. Registration of certificates: money provisions.

Provided that:

- 163 (1) either the time for bringing an appeal against a judgment¹ has expired and no such appeal has been brought within that time² or, such an appeal having been brought within that time, it has been finally disposed of³; and
- 164 (2) enforcement of the judgment is not for the time being stayed or suspended⁴, and the time available for its enforcement has not expired⁵,

the proper officer⁶ must issue to the applicant, on a relevant application⁷, a certificate in the prescribed⁸ form which:

- 165 (a) states the sum or aggregate of the sums (including any costs or expenses)⁹ payable under the money provisions¹⁰ contained in the judgment, the rate of interest¹¹, if any, payable thereon and the date or time from which any such interest began to accrue¹²; and
- 166 (b) states that the conditions set out in heads (1) and (2) above are satisfied in relation to the judgment¹³; and
- 167 (c) contains such other particulars as may be prescribed¹⁴.

More than one certificate may be issued under these provisions (simultaneously or at different times) in respect of the same judgment¹⁵.

Where a certificate has been issued under the provisions described above in any part of the United Kingdom¹⁶, any interested party may, within six months from the date of its issue, apply in the prescribed manner to the proper officer of the superior court¹⁷ in any other part of the United Kingdom for the certificate to be registered in that court¹⁸, and that officer must register the certificate in that court in the prescribed manner¹⁹. Subject to the provisions described below, and to any provision made by rules of court as to the manner in which and the conditions subject to which a certificate registered under these provisions may be enforced²⁰, a certificate registered under these provisions is, for the purposes of its enforcement, of the same force and effect, and the registering court has in relation to its enforcement the same powers, and proceedings for or with respect to its enforcement may be taken, as if the certificate had been a judgment originally given in the registering court and had (where relevant) been entered²¹.

Where a certificate is registered under these provisions, the reasonable costs or expenses of and incidental to the obtaining of the certificate and its registration are recoverable as if they were costs or expenses stated in the certificate to be payable under a money provision contained in the original judgment²². These sums carry interest as if they were the subject of an order for costs or expenses made by the registering court on the date of registration of the certificate²³.

Subject to certain provisions²⁴, the debt resulting from the registration of the certificate, apart from the reasonable costs or expenses mentioned above, carries interest at the rate, if any, stated in the certificate from the date or time so stated²⁵. Rules of court may provide as to the

manner in which, and the periods by reference to which, any interest so payable is to be calculated and paid, including provision for such interest to cease to accrue as from a prescribed date²⁶. Except as provided above, sums payable by virtue of the registration of a certificate do not carry interest²⁷.

1 As to the meaning of 'judgment' see para 201 note 6 ante.

2 Civil Jurisdiction and Judgments Act 1982 s 18(1)(a), Sch 6 para 3(a)(i).

3 Ibid Sch 6 para 3(a)(ii).

4 As to stays and suspension of enforcement see para 204 post.

5 Civil Jurisdiction and Judgments Act 1982 Sch 6 para 3(b).

6 Ie the proper officer of the original court: see para 201 ante.

7 Ie an application under the Civil Jurisdiction and Judgments Act 1982 Sch 6 para 2: see para 201 text and notes 7, 9-13 ante.

8 'Prescribed' means prescribed by rules of court: ibid Sch 6 para 1. The relevant rules of court are given in CPR 74.15 (see note 18 infra) and CPR 74.17 (see para 201 note 7 ante). See also *Practice Direction-- Enforcement of Judgments in Different Jurisdictions* PD74.

9 See the text and notes 22-23 infra.

10 For the meaning of 'money provisions' see para 201 note 4 ante.

11 As to interest see the text and notes 23-27 infra.

12 Civil Jurisdiction and Judgments Act 1982 Sch 6 para 4(1)(a).

13 Ibid Sch 6 para 4(1)(b).

14 Ibid Sch 6 para 4(1)(c). See note 8 supra.

15 Ibid Sch 6 para 4(2).

16 For the meaning of 'United Kingdom' see para 4 ante.

17 'Superior court' means, in relation to England and Wales or Northern Ireland, the High Court and, in relation to Scotland, the Court of Session: Civil Jurisdiction and Judgments Act 1982 Sch 6 para 5(2); Sch 7 para 5(2). As to the meanings of 'England', 'English' and 'English law' for the purposes of this title see para 4 ante.

18 Ibid Sch 6 para 5(1). Where an application is made to the High Court under Sch 6 para 5 for the registration of a certificate for the enforcement of the money provisions of a judgment which has been given by a court in another part of the United Kingdom, and to which s 18 applies (CPR 74.15(1)), the certificate must within six months of the date of its issue be filed in the Central Office of the Supreme Court, together with a copy certified by written evidence to be a true copy (CPR 74.15(2)). For the meaning of 'money provision' see para 201 note 7 ante.

19 Civil Jurisdiction and Judgments Act 1982 Sch 6 para 5(3).

20 Ibid Sch 6 para 6(2).

21 Ibid Sch 6 para 6(1).

22 Ibid Sch 6 para 7.

23 Ibid Sch 6 para 8(3).

24 Ie the provisions in ibid Sch 6 para 8(2): see the text and note 26 infra.

25 Ibid Sch 6 para 8(1).

26 Ibid Sch 6 para 8(2). See note 8 supra.

27 Ibid Sch 6 para 8(4).

UPDATE

202 Registration of certificates: money provisions

TEXT AND NOTE 18--CPR 74.15(2) amended: SI 2009/2092.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(4) ENFORCEMENT OF UNITED KINGDOM JUDGMENTS BETWEEN DIFFERENT PARTS OF THE UNITED KINGDOM OR IN FOREIGN COUNTRIES/203. Registration of certified copy of judgment containing non-money provisions.

203. Registration of certified copy of judgment containing non-money provisions.

Provided that:

168 (1) either the time for bringing an appeal against a judgment¹ containing non-money provisions² has expired and no such appeal has been brought within that time³ or, such an appeal having been brought within that time, it has been finally disposed of⁴; and

169 (2) enforcement of the judgment is not for the time being stayed or suspended⁵, and the time available for its enforcement has not expired⁶,

the proper officer must issue to the applicant, on a relevant application⁷, a certified copy of the judgment (including any money provisions or excepted provisions⁸ which it may contain)⁹ and a certificate stating that the conditions in heads (1) and (2) above are satisfied in relation to the judgment¹⁰.

More than one certified copy of the same judgment, and more than one certificate in respect of the same judgment, may be issued (simultaneously or at different times) under these provisions¹¹.

Where a certified copy of a judgment has been issued under the above provisions in any part of the United Kingdom¹², any interested party may apply in the manner prescribed by rules of court to the superior court¹³ in any other part of the United Kingdom for the judgment to be registered in that court¹⁴. An application under these provisions for the registration of a judgment must be accompanied by:

170 (a) a certified copy of the judgment issued under these provisions¹⁵; and

171 (b) the certificate issued in respect of the judgment by the proper officer of the original court¹⁶ not more than six months before the date of the application¹⁷.

A judgment must not be registered under these provisions by the superior court in any part of the United Kingdom if compliance with the non-money provisions contained in it would involve a breach of the law of that part of the United Kingdom¹⁸. Except when to do so would involve such a breach, where an application under these provisions is duly made to a superior court, the court must order the whole of the judgment, as set out in the certified copy, to be registered in that court in the prescribed manner¹⁹.

Subject to the provisions described below, and to any provision made by rules of court as to the manner in which and the conditions subject to which the non-money provisions contained in a judgment registered under these provisions may be enforced²⁰, the non-money provisions contained in a judgment registered under these provisions are, for the purposes of its enforcement, of the same force and effect, and the registering court has in relation to its enforcement the same powers, and proceedings for or with respect to its enforcement may be taken, as if the judgment containing them had been originally given in the registering court and had (where relevant) been entered²¹.

Where a judgment is registered under these provisions, the reasonable costs or expenses of and incidental to:

- 172 (i) the obtaining of the certified copy of the judgment, together with the certificate from the proper officer of the original court stating that certain conditions concerning appeals and the staying or suspension of enforcement have been satisfied²²; and
- 173 (ii) the registration of the judgment²³,

are recoverable as if on the date of registration there had also been registered in the original court a certificate²⁴ in respect of the judgment and as if those costs or expenses were costs or expenses stated in that certificate to be payable under a money provision contained in the judgment²⁵.

All such reasonable costs and expenses carry interest as if they were the subject of an order for costs or expenses made by the registering court on the date of registration of the judgment²⁶.

1 For the meaning of 'judgment' see para 201 note 6 ante.

2 For the meaning of 'non-money provision' see para 201 note 5 ante.

3 Civil Jurisdiction and Judgments Act 1982 s 18(1)(b), Sch 7 para 3(a)(i).

4 Ibid Sch 7 para 3(a)(ii).

5 As to stays and suspension of enforcement see para 204 post.

6 Civil Jurisdiction and Judgments Act 1982 Sch 7 para 3(b).

7 Ie an application under ibid Sch 7 para 2(2)(a)-(e) (see para 201 text and notes 10-13 ante): Sch 7 para 4(1).

8 'Excepted provision' means any provision of a judgment which is excepted from the application of ibid s 18 by s 18(5) (see para 201 text and notes 22-27 ante): Sch 7 para 4(2).

9 Ibid Sch 7 para 4(1)(a).

10 Ibid Sch 7 para 4(1)(b).

11 Ibid Sch 7 para 4(3).

12 For the meaning of 'United Kingdom' see para 4 ante.

13 For the meaning of 'superior court' see para 202 note 17 ante.

14 Civil Jurisdiction and Judgments Act 1982 Sch 7 para 5(1). Applications made to the High Court under Sch 7 para 5 for the registration for enforcement of the non-money provisions of a judgment, given by a court in another part of the United Kingdom, and to which s 18 applies, may be made without notice: CPR 74.16(1), (2). For the meaning of 'non-money provision' for these purposes see para 201 note 8 ante. The provisions of CPR 74.6 (see para 167 note 13 ante) apply to judgments registered under the Civil Jurisdiction and Judgments Act 1982 Sch 7 as they apply to judgments registered under s 4 (see para 192 note 24 ante): CPR 74.16(4). The provisions of CPR 74.7 (see para 167 note 14 ante) apply to applications to set aside the registration of a judgment under the Civil Jurisdiction and Judgments Act 1982 Sch 7 para 9, as they apply to applications to set aside registrations under the Administration of Justice Act 1920 (see para 167 note 14 ante) and the Foreign Judgments (Reciprocal Enforcement) Act 1933 (see para 176 note 3 ante): CPR 74.16(5).

See also *Practice Direction--Enforcement of Judgments in Different Jurisdictions* PD74.

15 Civil Jurisdiction and Judgments Act 1982 Sch 7 para 5(3)(a); CPR 74.16(3)(a).

16 Ie the certificate stating that the conditions concerning appeals and the staying or suspension of enforcement are satisfied in relation to the judgment: see the text and notes 1-6 supra.

17 Civil Jurisdiction and Judgments Act 1982 Sch 7 para 5(3)(b); CPR 74.16(3)(b). The certificate must state that the conditions set out in the Civil Jurisdiction and Judgments Act 1982 Sch 7 para 3 (see the text and notes 1-6 supra) are satisfied in relation to the judgment: CPR 74.16(3)(b).

- 18 Civil Jurisdiction and Judgments Act 1982 Sch 7 para 5(5).
- 19 Ibid Sch 7 para 5(4).
- 20 Ibid Sch 7 para 6(2).
- 21 Ibid Sch 7 para 6(1).
- 22 As to these conditions see note 16 supra.
- 23 Civil Jurisdiction and Judgments Act 1982 Sch 7 para 7(1)(a)-(b).
- 24 Ie a certificate under ibid Sch 6: see para 202 ante.
- 25 Ibid Sch 7 para 7(1).
- 26 Ibid Sch 7 para 7(2).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(4) ENFORCEMENT OF UNITED KINGDOM JUDGMENTS BETWEEN DIFFERENT PARTS OF THE UNITED KINGDOM OR IN FOREIGN COUNTRIES/204. Staying of enforcement and setting aside of registration: money and non-money provisions.

204. Staying of enforcement and setting aside of registration: money and non-money provisions.

Where a certificate¹ in respect of a judgment² (in the case of money provisions)³, or a judgment (in the case of non-money provisions)⁴, has been registered⁵, the registering court may, if it is satisfied that any person against whom it is sought to enforce the certificate or judgment is entitled and intends to apply under the law of that part of the United Kingdom in which the judgment was given for any remedy which would result in the setting aside of the judgment, stay proceedings for the enforcement of the judgment, on such terms as it thinks fit, for such period as appears to the court to be reasonably sufficient to enable the application to be disposed of⁶.

Where the certificate or judgment has been registered, the registering court:

- 174 (1) must set aside the registration if, on an application made by any interested party, it is satisfied that the registration was contrary to the relevant statutory provisions⁷; and
- 175 (2) may set aside the registration if, on an application made by any interested party, it is satisfied that the matter in dispute in the proceedings in which the judgment in question was given had previously been the subject of a judgment by another court or tribunal having jurisdiction in the matter⁸.

¹ As to certificates in respect of money provisions in a judgment see the Civil Jurisdiction and Judgments Act 1982 s 18(1)(a), Sch 6; and para 202 ante.

² For the meaning of 'judgment' see para 201 note 6 ante.

³ See the Civil Jurisdiction and Judgments Act 1982 Sch 6; and para 202 ante. For the meaning of 'money provisions' see para 201 note 7 ante.

⁴ See *ibid* s 18(1)(b), Sch 7; and para 203 ante. For the meaning of 'non-money provisions' see para 201 note 8 ante.

⁵ *Ie* registered in the superior court in a part of the United Kingdom other than that in which it was obtained: see *ibid* Sch 6 para 5, Sch 7 para 5; and see paras 202-203 ante. For the meaning of 'superior court' see para 202 note 17 ante. For the meaning of 'United Kingdom' see para 4 ante.

⁶ *Ibid* Sch 6 para 9, Sch 7 para 8.

⁷ *Ie* *ibid* Sch 6 or, as appropriate, Sch 7.

⁸ *Ibid* Sch 6 para 10, Sch 7 para 9.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(4) ENFORCEMENT OF UNITED KINGDOM JUDGMENTS BETWEEN DIFFERENT PARTS OF THE UNITED KINGDOM OR IN FOREIGN COUNTRIES/205. Recognition of United Kingdom judgments.

205. Recognition of United Kingdom judgments.

Generally¹, no judgment² to which Part II of the Civil Jurisdiction and Judgments Act³ applies may be refused recognition in another part of the United Kingdom⁴ solely on the ground that, in relation to that judgment, the court which gave it was not a court of competent jurisdiction according to the rules of private international law in force in that other part⁵.

This provision does not, however, apply⁶ to:

- 176 (1) any award or order made by a tribunal in any part of the United Kingdom which is enforceable in that part without an order of a court of law⁷; or
- 177 (2) an arbitration award which has become enforceable in the part of the United Kingdom in which it was given in the same manner as a judgment given by a court of law in that part⁸; or
- 178 (3) an order which is enforceable in the same manner as a judgment of the High Court by virtue of certain statutory provisions⁹.

1 As to the exceptions see the text and notes 6-9 infra.

2 For the meaning of 'judgment' see para 201 note 6 ante.

3 I.e. the Civil Jurisdiction and Judgments Act 1982 Pt II (ss 16-19) (as amended).

4 For the meaning of 'United Kingdom' see para 4 ante.

5 Civil Jurisdiction and Judgments Act 1982 s 19(1).

6 Ibid s 19(2).

7 I.e. an award within the definition in *ibid* s 18(2)(d): s 19(3)(b).

8 I.e. an award within the definition in *ibid* s 18(2)(e): s 19(3)(b).

9 I.e. an order enforceable by virtue of the Contempt of Court Act 1981 s 16 (as amended) (see *CONTEMPT OF COURT* vol 9(1) (Reissue) paras 504, 508) or the Supreme Court Act 1981 s 140 (relating to fines for contempt of court and forfeiture of recognisances) (see *CIVIL PROCEDURE* vol 12 (2009) PARA 1512): Civil Jurisdiction and Judgments Act 1982 ss 18(4), 19(3)(c). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

UPDATE

205 Recognition of United Kingdom judgments

NOTE 9--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(5) ENFORCEMENT OF EUROPEAN COMMUNITY JUDGMENTS, ETC/206. European Community judgments, etc.

(5) ENFORCEMENT OF EUROPEAN COMMUNITY JUDGMENTS, ETC

206. European Community judgments, etc.

European Community judgments¹ and Euratom inspection orders² are enforceable in England by virtue of the relevant treaties and by Order in Council³.

The High Court⁴ must, upon application duly made for the purpose by the person entitled to enforce it, forthwith register⁵:

- 179 (1) any Community judgment to which the Secretary of State⁶ has appended an order for enforcement⁷; or
- 180 (2) any Euratom inspection order⁸.

Such an application, which may be made without notice⁹, must be supported by written evidence exhibiting:

- 181 (a) the Community judgment¹⁰ or, as the case may be, the Euratom inspection order¹¹, and the order for its enforcement¹², or an authenticated copy¹³; and
- 182 (b) where the Community judgment or Euratom inspection order is not in English, a translation of it into English either certified by a notary public or other qualified person or accompanied by written evidence confirming that the translation is accurate¹⁴.

Where the application is for registration of a Community judgment which is a money judgment¹⁵, the evidence must state:

- 183 (i) the name of the judgment creditor and his address for service within the jurisdiction¹⁶;
- 184 (ii) the name of the judgment debtor and his address or place of business, if known¹⁷;
- 185 (iii) the amount in respect of which the judgment is unsatisfied¹⁸; and
- 186 (iv) that the European Court has not suspended enforcement of the judgment¹⁹.

Rules of court require notice to be given of the registration of a Community judgment or Euratom inspection order to the persons against whom the judgment was given or the order was made²⁰. Accordingly, a copy of the order granting permission to register a Community judgment or Euratom order (as the case may be) must be served on every person against whom the judgment was given²¹. The registration order must state the name and address for service of the person who applied for registration, and must exhibit a copy of the registered Community judgment or Euratom order (as the case may be) and a copy of the order for its enforcement²².

Where it appears that a Community judgment under which a sum of money is payable has been partly satisfied at the date of the application for its registration, the judgment must be registered only in respect of the balance remaining payable at that date²³. Where, after the date of registration of a Community judgment under which a sum of money is payable, it is

shown that at that date the judgment had been partly or wholly satisfied, the registration must be varied or cancelled accordingly with effect from that date²⁴.

A Community judgment registered in accordance with the provisions described above has, for all purposes of execution, the same force and effect, and proceedings may be taken on the judgment, and any sum payable under the judgment carries interest, as if the judgment had been a judgment or order given or made by the High Court on the date of registration²⁵.

Upon registration of a Euratom inspection order in accordance with the provisions described above, the High Court may make such order as it thinks fit against any person for the purpose of ensuring that effect is given to the Euratom inspection order²⁶.

Enforcement of a Community judgment may be suspended only by a decision of the European Court²⁷. An order of the European Court that enforcement of a registered Community judgment is to be suspended must, on production to the High Court, be registered forthwith and is of the same effect as if the order had been an order made by the High Court on the date of its registration staying the execution of the judgment for the same period and on the same conditions as are stated in the order of the European Court; and no steps to enforce the judgment may thereafter be taken while such an order remains in force²⁸.

1 'Community judgment' means any decision, judgment or order which is enforceable under or in accordance with the relevant provisions of the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) ('the EC Treaty'), the Treaty establishing the European Atomic Energy Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) ('the Euratom Treaty'), the Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951; TS 16 (1979); Cmnd 7461) ('the ECSC Treaty') or EC Council Regulation 40/94 on the community trade mark (OJ L11, 14.01.94, p 1) (as amended): see the European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, art 2(1) (amended by SI 1998/1259); and CPR 74.19(a).

2 'Euratom inspection order' means an order made by or in the exercise of the functions of the President of the European Court or by the Commission of the European Communities under the relevant provision of the Euratom Treaty (see note 1 supra): see the European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, art 2(1); and CPR 74.19(b). 'European Court' means the Court of Justice of the European Communities: CPR 74.19(c). See also para 68 note 2 ante.

3 See the European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, art 3 (as amended), arts 4, 6. The order was made under the European Communities Act 1972 s 2(2). See also CIVIL PROCEDURE VOL 12 (2009) PARA 1232. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 The 'High Court' means in England and Wales and in Northern Ireland the High Court and in Scotland the Court of Session: European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, art 2(1).

5 See the text and notes 9-24 infra.

6 As to the Secretary of State see para 126 note 1 ante.

7 'Order for enforcement' means an order by or under the authority of the Secretary of State that the judgment to which it is appended is to be registered for enforcement in the United Kingdom: European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, art 2(1). See further note 12 infra. For the meaning of 'United Kingdom' see para 4 ante.

8 Ibid art 3(1). Where it appears that a judgment for the payment of money has been partly satisfied at the date of the application, the judgment must be registered only in respect of the balance: art 3(4). Where, after the date of registration of a Community judgment under which a sum of money is payable, it is shown that at that date the judgment had been partly or wholly satisfied, the registration must be varied or cancelled accordingly with effect from that date: art 3(5).

9 CPR 74.20, CPR 74.26(1).

10 For the meaning of 'Community judgment' see note 1 supra.

11 For the meaning of 'Euratom inspection order' see note 2 supra.

12 'Order for enforcement' means an order under the authority of the Secretary of State that the Community judgment to which it is appended is to be registered for enforcement in the United Kingdom: CPR 74.19(d).

13 CPR 74.21(1)(a), CPR 74.26(1).

14 CPR 74.21(1)(b), CPR 74.26(1).

15 CPR 74.21(2).

16 CPR 74.21(2)(a). As to service generally see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq.

17 CPR 74.21(2)(b).

18 CPR 74.21(2)(c).

19 CPR 74.21(2)(d). As to the suspension of a Community judgment see the text and notes 27-28 infra.

20 European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, art 3(3).

21 CPR 74.22(1), CPR 74.26(1).

22 CPR 74.22(2); CPR 74.26(1).

23 European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, art 3(4).

24 Ibid art 3(5). In the case of a Community judgment which is a money judgment, the registration order must also state the right of the judgment debtor to apply within 28 days for the variation or cancellation of the registration: CPR 74.22(3). An application to vary or cancel the registration of a Community judgment which is a money judgment on this ground must be made within 28 days of the date on which the registration order was served on the judgment debtor (CPR 74.23(1)) and must be supported by written evidence (CPR 74.23(2)). No steps may be taken to enforce a Community judgment which is a money judgment before the end of that 28-day period or, where an application is made for its variation or cancellation, until the application has been determined: CPR 74.24.

25 European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, art 4. As to interest on judgment debts see CIVIL PROCEDURE vol 12 (2009) PARA 1149. As to execution generally see CIVIL PROCEDURE vol 12 (2009) PARA 1265 et seq.

26 European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, art 6. An application to give effect to a Euratom inspection order may be made on written evidence: CPR 74.26(2). Where the matter is urgent it may be made without notice (CPR 74.26(2)(a)), but otherwise it may be made by claim form (CPR 74.26(2)(b)).

27 See CIVIL PROCEDURE vol 12 (2009) PARA 1232.

28 European Communities (Enforcement of Community Judgments) Order 1972, SI 1972/1590, art 5. Where the European Court has made an order that the enforcement of a registered Community judgment should be suspended, an application for the registration of that order in the High Court, which may be made without notice (CPR 74.25(2)), is made by filing a copy of the order in the Central Office of the Supreme Court (CPR 74.25(1)). As to the Central Office of the Supreme Court see COURTS vol 10 (Reissue) para 641.

UPDATE

206 European Community judgments, etc

TEXT AND NOTES--See further CPR 74.27-74.33 (added by SI 2005/2292; and amended by SI 2008/2178), which provide for the enforcement of European Enforcement orders.

NOTE 1--'Community judgment' also means any decision, judgment or order which is enforceable under or in accordance with EC Council Regulation 6/2002: SI 1972/1590 art 2(1) (amended by SI 2003/3204). By virtue of art 97, the ECSC Treaty has now expired. Since 24 July 2002, the sectors previously covered by this Treaty, and the procedural rules and other secondary legislation derived from it, have been subject to the rules of the EC Treaty as well as the procedural rules and other secondary legislation derived from the EC Treaty. Regulation 40/94 replaced: EC Council

Regulation 207/2009 (OJ L78, 24.3.2009, p 1); references to the repealed regulation should be construed as references to Regulation 207/2009 and read in accordance with the correlation table in Annex II: art 166.

NOTE 28--CPR 74.25(1) amended: SI 2009/2092.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/4. FOREIGN AND UNITED KINGDOM JUDGMENTS/(6) INTERNATIONAL CONVENTIONS AFFECTING THE RECOGNITION OF JUDGMENTS/207. International conventions and the recognition and enforcement of foreign judgments within their scope.

(6) INTERNATIONAL CONVENTIONS AFFECTING THE RECOGNITION OF JUDGMENTS

207. International conventions and the recognition and enforcement of foreign judgments within their scope.

A judgment of a court or foreign country outside the United Kingdom¹ in proceedings regulated by the terms of certain international conventions which have been given effect under the law of the United Kingdom will be recognised and enforced if the jurisdictional requirements of the convention in question are complied with. In the case of certain conventions, judgments given by foreign courts may be registered for enforcement in England². Where the judgment is given in a Regulation state or in a contracting state³, then the conditions laid down in that particular convention for the recognition and enforcement of the judgment will apply. In any event, the provisions of the 'Brussels I' Regulation and the Brussels and Lugano Conventions themselves may also be applied to secure the enforcement of the judgment⁴. If the judgment is given by a court in a state to which the Foreign Judgments (Reciprocal Enforcement) Act 1933 applies⁵, it would accord with principle if such a judgment were treated as one given by a court with jurisdiction pursuant to that Act⁶.

1 For the meaning of 'United Kingdom' see para 4 ante.

2 See the Carriage of Goods by Road Act 1965 s 4 (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 678); the Merchant Shipping Act 1995 s 166 (see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 45 (2010) PARA 348); the Carriage of Passengers by Road Act 1974 s 5 (not in force at the date at which this volume states the law) (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 657); the Civil Aviation Act 1982 s 74A (as added) (see AIR LAW vol 2 (2008) PARA 23); and the International Transport Conventions Act 1983 s 6 (see CARRIAGE AND CARRIERS vol 7 (2008) PARA 683). The scheme for registration is usually modelled on the Foreign Judgments (Reciprocal Enforcement) Act 1933: see paras 171-182 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

4 'Brussels I' Regulation art 71 para 2; Brussels Convention art 57 para 2; Lugano Convention art 57 para 5. In the case of the Brussels and Lugano Conventions, this provision applies if both the foreign state and the United Kingdom are party to the particular convention; in the case of the 'Brussels I' Regulation, it applies if the Regulation state of origin and the Regulation state addressed are party to the particular convention. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

5 As to the application of the Foreign Judgments (Reciprocal Enforcement) Act 1933 see para 171 ante.

6 See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 584-585.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/A. GENERAL PRINCIPLE OF VALIDITY/208. Validity governed by *lex loci celebrationis*.

5. FAMILY LAW

(1) MARRIAGE

(i) Formalities of Marriage

A. GENERAL PRINCIPLE OF VALIDITY

208. Validity governed by *lex loci celebrationis*.

Generally¹, the formal validity of a marriage is governed by the *lex loci celebrationis*, the law of the place where the marriage was celebrated². Without exception, a marriage is formally valid if it complies with the formal requirements of the *lex loci celebrationis* or alternatively, it seems, with its conflict rules for the formal validity of the marriage³, even though it does not comply with the formal requirements of the law of the parties' domicile or the conflict rules of that law for the formal validity of the marriage⁴; and in general⁵ a marriage is invalid if it is invalid under the *lex loci celebrationis* for failure to comply with its rules for the formal validity of the marriage, even though it complies with those of the law of the domicile⁶.

1 The general rule is subject to certain exceptions which are set out in paras 211-223 post.

2 *Berthiaume v Dastous* [1930] AC 79, PC; *Scrimshire v Scrimshire* (1752) 2 Hag Con 395; *Butler v Freeman* (1756) Amb 301; *Compton v Bearcroft* (1769) 2 Hag Con 444n; *Middleton v Janverin* (1802) 2 Hag Con 437; *Dalrymple v Dalrymple* (1811) 2 Hag Con 54; *Lady Herbert v Lord Herbert* (1819) 2 Hag Con 263; *Lacon v Higgins* (1822) 3 Stark 178; *Swift v Kelly* (1835) 3 Knapp 257, PC; *Kent v Burgess* (1840) 11 Sim 361; *Catherwood v Caslon* (1844) 13 M & W 261; *Ward and Codd v Dey* (1849) 1 Rob Eccl 759; *Simonin v Mallac* (1860) 2 Sw & Tr 67; *Brook v Brook* (1861) 9 HL Cas 193; *Rooker v Rooker* (1863) 3 Sw & Tr 526; *Re Alison's Trusts* (1874) 31 LT 638; *Lightbody v West* (1903) 19 TLR 319, CA; *Ogden v Ogden* [1908] P 46, CA; *Re Green, Noyes v Pitkin* (1909) 25 TLR 222; *Apt v Apt* [1948] P 83, [1947] 2 All ER 677, CA; *Kenward v Kenward* [1951] P 124, [1950] 2 All ER 297, CA; *Starkowski (otherwise Urbanski) v A-G* [1954] AC 155, [1953] 2 All ER 1272, HL; *Pilinski v Pilinska* [1955] 1 All ER 631, [1955] 1 WLR 329; *Lazarewicz (otherwise Fadanelli) v Lazarewicz* [1962] P 171, [1962] 2 All ER 5. As to the registration of foreign marriages celebrated under local law and of foreign marriage certificates see paras 224-225 post. As to proof of foreign marriages see CIVIL PROCEDURE vol 11 (2009) PARAS 917-923. See also *McCabe v McCabe* [1994] 1 FCR 257, [1994] 1 FLR 410, CA, which is not inconsistent with the proposition in the text, but involved the recognition as a valid marriage of an event held in Ghana, when both parties were in England and had appointed no proxies.

3 *Taczanowska (otherwise Roth) v Taczanowski* [1957] P 301 at 305, [1956] 3 All ER 457 at 460; on appeal [1957] P 301 at 318, [1957] 2 All ER 563 at 566, CA. In this case the evidence was that the marriage was invalid by the conflict rules of the *lex loci celebrationis*, but it is legitimate to infer from the fact of admission of such evidence that the marriage would have been held valid had it been recognised as such by those rules: see para 10 text and note 7 ante.

4 *Compton v Bearcroft* (1769) 2 Hag Con 444n; *Dalrymple v Dalrymple* (1811) 2 Hag Con 54; *Lady Herbert v Lord Herbert* (1819) 2 Hag Con 263; *Swift v Kelly* (1835) 3 Knapp 257 PC; *Ward and Codd v Dey* (1849) 1 Rob Eccl 759; *Simonin v Mallac* (1860) 2 Sw & Tr 67; *Rooker v Rooker and Newton* (1863) 3 Sw & Tr 526; *Lightbody v West* (1903) 19 TLR 319, CA; *Ogden v Ogden* [1908] P 46, CA; *Re Green, Noyes v Pitkin* (1909) 25 TLR 222; *Ramos v Ramos* (1911) 27 TLR 515; *Apt v Apt* [1948] P 83, [1947] 2 All ER 677, CA; *Starkowski (otherwise Urbanski) v A-G* [1954] AC 155, [1953] 2 All ER 1272, HL.

5 As to exceptions see paras 211-223 post.

6 *Scrimshire v Scrimshire* (1752) 2 Hag Con 395; *Middleton v Janverin* (1802) 2 Hag Con 437; *Lacon v Higgins* (1822) 3 Stark 178; *Kent v Burgess* (1840) 11 Sim 361; *Catherwood v Caslon* (1844) 13 M & W 261; *Re Alison's Trusts* (1874) 31 LT 638; *Berthiaume v Dastous* [1930] AC 79, PC; *Kenward v Kenward* [1951] P 124, [1950] 2 All ER 297, CA; *Pilinski v Pilinska* [1955] 1 All ER 631, [1955] 1 WLR 329; *Lazarewicz (otherwise Fadanelli) v Lazarewicz* [1962] P 171, [1962] 2 All ER 5.

UPDATE

208 Validity governed by *lex loci celebrationis*

NOTE 2--See also *H v L* [2009] EWHC 1306 (Fam), [2009] 2 FLR 1129, [2009] All ER (D) 124 (Jun).

NOTE 6--See also *Alfonso-Brown v Milwood* [2006] EWHC 642 (Fam), [2006] 2 FLR 265.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/A. GENERAL PRINCIPLE OF VALIDITY/209. Formalities of marriage.

209. Formalities of marriage.

The *lex loci celebrationis* governs all the formalities surrounding the actual ceremony of marriage itself including such questions as whether a religious ceremony is necessary or sufficient¹, whether a marriage may be constituted *per verba de praesenti* (that is, by an informal exchange of consent)², or whether a marriage may be celebrated by proxy³. It also governs the validity of notices, publication of banns, and all formal preliminaries⁴.

A requirement of parental consent to the marriage, whether imposed by English⁵ or foreign law, is regarded as a matter of form⁶.

1 *Re De Wilton, De Wilton v Montefiore* [1900] 2 Ch 481; *Berthiaume v Dastous* [1930] AC 79, PC; *Pilinski v Pilinska* [1955] 1 All ER 631, [1955] 1 WLR 329; *Lazarewicz (otherwise Fadanelli) v Lazarewicz* [1962] P 171, [1962] 2 All ER 5. As to the *lex loci celebrationis* see para 208 ante.

2 *Compton v Bearcroft* (1769) 2 Hag Con 444n; *Bell v Graham* (1859) 13 Moo PCC 242; *Beamish v Beamish* (1861) 9 HL Cas 274.

3 *Apt v Apt* [1948] P 83, [1947] 2 All ER 677, CA; *Ponticelli v Ponticelli (otherwise Giglio)* [1958] P 204, [1958] 1 All ER 357. Cf *McCabe v McCabe* [1994] 1 FCR 257, [1994] 1 FLR 410, CA (as to which see also para 208 note 2 ante).

4 See the cases cited in para 208 note 2 ante.

5 *Compton v Bearcroft* (1769) 2 Hag Com 444n. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

6 *Simonin v Mallac* (1860) 2 Sw & Tr 67; *Brook v Brook* (1861) 9 HL Cas 193 at 215, 217-218, 229; *Sottomayer v De Barros* (1877) 3 PD 1 at 7, CA; cf *Sottomayer v De Barros (No 2)* (1879) 5 PD 94 at 102-103; *Ogden v Ogden* [1908] P 46, CA; *Chetti v Chetti* [1909] P 67 at 81-87; *Bliersbach v MacEwen* 1959 SC 43, 1959 SLT 81; *Lodge (otherwise Berkowitz) v Lodge* (1963) 107 Sol Jo 437. This proposition has been criticised on the ground that the requirement of parental consent should not be characterised in the abstract, since it varies in nature and effect under the laws of different countries and should in certain cases be treated as relating to legal capacity: see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 657-658. However, in none of the above cases did the law imposing the requirement of parental consent provide that non-compliance rendered the marriage void *ab initio*: such a requirement might well relate to legal capacity.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/A. GENERAL PRINCIPLE OF VALIDITY/210. Changes in the *lex loci celebrationis*.

210. Changes in the *lex loci celebrationis*.

Retrospective legislation in the place of celebration of the marriage curing the formal invalidity of the marriage will be recognised in England¹ even though at the time when the legislation takes effect both parties are domiciled in England².

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante. As to the law of the place of celebration of the marriage (ie the *lex loci celebrationis*) generally see para 208 ante.

2 *Starkowski (otherwise Urbanski) v A-G* [1954] AC 155, [1953] 2 All ER 1272, HL. The question as to whether such legislation would be recognised if one of the parties had entered into another marriage before it took effect was expressly reserved: *Starkowski (otherwise Urbanski) v A-G* supra at 168, 172, 176, 182 and 1273, 1275, 1279, 1282. All laws passed by the legislatures of any of Her Majesty's possessions abroad establishing the validity of marriages contracted in those possessions are effective in all parts of Her Majesty's dominions, provided that, according to English conflict rules, both parties had capacity to contract the marriage: Colonial Marriages Act 1865 ss 1, 2. As to legal capacity to marry see paras 227-231 post. As to Her Majesty's possessions and dominions see COMMONWEALTH vol 13 (2009) PARAS 703, 707.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/B. EXCEPTIONS TO GENERAL PRINCIPLE/211. Compliance with *lex loci celebrationis* impossible.

B. EXCEPTIONS TO GENERAL PRINCIPLE

211. Compliance with *lex loci celebrationis* impossible.

Where the local forms are inapplicable¹ or where there is insuperable² difficulty in complying with them³, a marriage is formally valid if celebrated in accordance with the English common law⁴. In such a case the marriage need not be celebrated in a church or chapel⁵ or before a minister of religion⁶ or in the presence of witnesses⁷; it is probably sufficient that the parties take each other for man and wife by an informal exchange of consent⁸.

1 Local forms may be inapplicable by virtue of the constitutional principle that the English common law, or so much of it as is applicable in the circumstances, applies to holders of British nationality in a settled colony and in countries where Her Majesty by capitulatory agreement exercises extra-territorial jurisdiction over holders of British nationality. For cases in the former category see *Lautour v Teesdale* (1816) 8 Taunt 830; *Catterall v Catterall* (1847) 1 Rob Eccl 580; *Maclean v Cristall* (1849) 7 Notes of Cases, Supp xvii at xxv; *Countess of Limerick v Earl of Limerick* (1863) 4 Sw & Tr 252; *James v James and Smyth* (1881) 51 LJP 24. For cases in the latter category see *Phillips v Phillips* (1921) 38 TLR 150; *Watts (otherwise Carey) v Watts* (1922) 38 TLR 430; *Martin v Martin and May* (1928) 72 Sol Jo 612; *Doust v Doust* (1929) 168 LT Jo 113; *Matthews v Matthews* (1930) 99 LJP 142; *Wolfenden v Wolfenden* [1946] P 61, [1945] 2 All ER 539; *Penhas v Tan Soo Eng* [1953] AC 304, [1953] 2 WLR 459, PC. These cases are apparent but not real exceptions to the general rule (since English common law is deemed to be the local law for holders of British nationality): *Taczanowska (otherwise Roth) v Taczanowski* [1957] P 301 at 328-329, [1957] 2 All ER 563 at 574, CA; *Merker v Merker* [1963] P 283 at 294, [1962] 3 All ER 928 at 933.

2 Mere difficulty is insufficient: *Kent v Burgess* (1840) 11 Sim 361; *Starkowski v A-G* [1952] P 135 at 141, [1952] 1 All ER 495 at 496-497 (on appeal [1952] P 302, [1952] 2 All ER 616, CA; [1954] AC 155, [1953] 2 All ER 1272, HL).

3 *Lord Cloncurry's Case* (1811) cited in 6 State Tr NS 87; *Ruding v Smith* (1821) 2 Hag Con 371; *Taczanowska (otherwise Roth) v Taczanowski* [1957] P 301 at 312-313, [1956] 3 All ER 457 at 465 (on appeal [1957] P 301 at 324-325, 328-329, 332, [1957] 2 All ER 563 at 571, 574, 576, CA); *Kochanski v Kochanska* [1958] P 147 at 152, [1957] 3 All ER 142 at 144-145 (disapproved on another point in *Preston (otherwise Putynski) v Preston (otherwise Putynska) (otherwise Basinska)* [1963] P 411, [1963] 2 All ER 405, CA); *Lazarewicz (otherwise Fadanelli) v Lazarewicz* [1962] P 171 at 177, [1962] 2 All ER 5 at 7-8; *Preston (otherwise Putynski) v Preston (otherwise Putynska) (otherwise Basinska)* [1963] P 141 at 155, [1962] 3 All ER 1057 at 1064 (on appeal [1963] P 411, [1963] 2 All ER 405, CA); *Narewski v Narewski* (1966) 110 Sol Jo 466. The principle would presumably also apply where there was no *lex loci celebrationis* (see para 208 ante), as in unclaimed deserted lands: see *Advocate-General of Bengal v Ranee Surnomoye Dossee* (1863) 2 Moo PCCNS 22 at 59; *Kochanski v Kochanska* supra at 152 and 144. It applies to holders of British nationality and aliens alike; the common law conception of marriage knows no distinction of race or nationality: *Taczanowska (otherwise Roth) v Taczanowski* supra at 326-327 and 572-573. See also the cases cited supra. As to the nature and requisites of a valid marriage under English law see MATRIMONIAL AND CIVIL PARTNERSHIP LAW. As to the meanings of 'English', 'English' and 'English law' see para 4 ante.

4 See the cases cited in notes 1, 3 supra.

5 *Ruding v Smith* (1821) 2 Hag Con 371; *Smith v Maxwell* (1824) Ry & M 80; *Penhas v Tan Soo Eng* [1953] AC 304, [1953] 2 WLR 459, PC.

6 *Penhas v Tan Soo Eng* [1953] AC 304, [1953] 2 WLR 459, PC. In *R v Millis* (1844) 10 Cl & Fin 534, HL, and *Beamish v Beamish* (1861) 9 HL Cas 274, it was held that the presence of an episcopally ordained priest was essential to the validity of a common law marriage; but these decisions have since been confined to marriages celebrated in England and Ireland: *Wolfenden v Wolfenden* [1946] P 61, [1945] 2 All ER 539 (approved on this point in *Apt v Apt* [1948] P 83 at 86, [1947] 2 All ER 677 at 679, CA; and in *Penhas v Tan Soo Eng* supra at 319 and 464). See also the cases cited in notes 1, 3 supra, 8 infra. Note that English law now permits civil marriage: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 54, 87 et seq.

7 *Ussher v Ussher* [1912] 2 IR 445, 46 ILT 109. See also note 6 supra.

8 le per verba de praesenti (see para 209 ante): see *Dalrymple v Dalrymple* (1811) 2 Hag Con 54 at 64-70; *Lautour v Teesdale* (1816) 8 Taunt 830 at 837; *Catterall v Catterall* (1847) 1 Rob Eccl 580 at 583; *Merker v Merker* [1963] P 283, [1962] 3 All ER 928; *Preston (otherwise Putynski) v Preston (otherwise Putynska) (otherwise Basinska)* [1963] P 411 at 436, [1963] 2 All ER 405 at 416, CA.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/B. EXCEPTIONS TO GENERAL PRINCIPLE/212. Marriages in merchant ships.

212. Marriages in merchant ships.

It would seem that the formal validity of a marriage on board a merchant ship on the high seas is governed by the law of the country where the ship is registered¹. In the case of a merchant ship registered in England the law applicable would seem to be the English common law².

1 This follows from the principle that the law of the flag governs transactions on board a vessel on the high seas: see SHIPPING AND MARITIME LAW.

2 The statutory formal requirements do not seem to apply to marriages at sea. For the common law requirements see para 211 ante (although there is no English authority on this point). In *Du Moulin v Druitt* (1860) 13 ICLR 212, it was held that the presence of an episcopally ordained clergyman was necessary but this is questionable: see para 211 note 6 ante. It has been suggested that marriages on British merchant ships on the high seas are valid only if it is impracticable for the parties to wait until the ship has reached a port where sufficient facilities are available either by the *lex loci celebrationis* (see para 208 ante) or under the Foreign Marriage Act 1892 (see paras 215-223 post): Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 660-661. This would bring the marriage into the same category as those in para 211 ante: cf *Culling v Culling* [1896] P 116. Marriages on board British warships are now governed by the Foreign Marriage Act 1892 s 22 (as substituted and amended): see para 214 post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/B. EXCEPTIONS TO GENERAL PRINCIPLE/213. Marriages in countries under belligerent occupation.

213. Marriages in countries under belligerent occupation.

A marriage in a country under belligerent occupation is formally valid if celebrated within the lines of the occupying forces, in accordance with the English common law¹, between parties of whom at least one² is a member of those forces³ or of forces associated with them⁴, unless both parties intended to subject themselves to the local law⁵. No distinction is made for this purpose between holders of British nationality and aliens or between persons domiciled in England and persons domiciled elsewhere⁶.

1 See para 211 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 The status of the other party seems to be immaterial: *Taczanowska (otherwise Roth) v Taczanowski* [1957] P 301 at 320, [1957] 2 All ER 563 at 567-568, CA, per Hodson LJ; *Preston (otherwise Putynski) v Preston (otherwise Putynska) (otherwise Basinska)* [1963] P 411 at 425, 430, [1963] 2 All ER 405 at 410, 413, CA.

3 *Taczanowska (otherwise Roth) v Taczanowski* [1957] P 301 at 314, [1957] 2 All ER 563, CA; *Merker v Merker* [1963] P 283, [1962] 3 All ER 928; cf *Ruding v Smith* (1821) 2 Hag Con 371.

4 *Preston (otherwise Putynski) v Preston (otherwise Putynska) (otherwise Basinska)* [1963] P 411, [1963] 2 All ER 405, CA. The principle does not apply to the marriage of inmates of a displaced persons camp: *Preston (otherwise Putynski) v Preston (otherwise Putynska) (otherwise Basinska)* supra at 426-427, 434-435 and 411, 415, CA, disapproving *Kochanski v Kochanska* [1958] P 147, [1957] 3 All ER 142. It may perhaps apply to members of an organised body of prisoners of war: *Merker v Merker* [1963] P 283, [1962] 3 All ER 928, explaining *Kochanski v Kochanska* supra.

5 *Lazarewicz (otherwise Fadanelli) v Lazarewicz* [1962] P 171, [1962] 2 All ER 5, approved in *Preston (otherwise Putynski) v Preston (otherwise Putynska) (otherwise Basinska)* [1963] P 411 at 432, [1963] 2 All ER 405 at 414, CA. The presumption is that the parties have not subjected themselves to the local law; it is a matter of intention in the limited sense that they may opt in: *Preston (otherwise Putynski) v Preston (otherwise Putynska) (otherwise Basinska)* supra at 433 and 415.

6 *Taczanowska (otherwise Roth) v Taczanowski* [1957] P 301 at 326, [1957] 2 All ER 563 at 572, CA. Apart from the *lex loci celebrationis* (see para 208 ante), the court will only refer to the English common law, and it will not refer to the law of the parties' domicile or nationality: *Taczanowska (otherwise Roth) v Taczanowski* supra at 326, 331 and 572, 575; *Preston (otherwise Putynski) v Preston (otherwise Putynska) (otherwise Basinska)* [1963] P 141 at 152-153, [1962] 3 All ER 1057 at 1062-1063 (on appeal [1963] P 411, [1963] 2 All ER 405, CA). The burden of proving that the marriage is valid under this exception to the general rule governing the formal validity of a marriage is on the party who asserts the exception: *Kochanski v Kochanska* [1958] P 147 at 151, [1957] 3 All ER 142 at 144; *Preston (otherwise Putynski) v Preston (otherwise Putynska) (otherwise Basinska)* supra at 153-154 and 1063.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/B. EXCEPTIONS TO GENERAL PRINCIPLE/214. Marriages by chaplains of Her Majesty's forces.

214. Marriages by chaplains of Her Majesty's forces.

A marriage solemnised in any foreign territory¹ by a chaplain serving with any part of the naval, military or air forces of Her Majesty² serving in that territory³ or by a person authorised, either generally or in respect of the particular marriage, by the commanding officer of any part of those forces, is as valid in law as if the marriage had been solemnised in the United Kingdom⁴ with a due observance of all forms required by law⁵.

This provision applies only if at least one of the parties to the marriage is a person who is:

- 187 (1) a member of the naval, military or air forces serving in the territory; or
- 188 (2) a person employed in that territory⁶ in one of certain other prescribed capacities⁷; or
- 189 (3) a child⁸ of any such person who has his home with that person in that territory,

and provided that certain prescribed conditions as to: (a) notification of absence of objection; and (b) solemnisation in the presence of witnesses, are complied with⁹. There is no requirement that either party must be a holder of British nationality¹⁰.

A marriage solemnised under the above provisions must be registered¹¹. In any legal proceedings touching upon the validity of the marriage, it is not necessary to prove the authority of the person by or before whom it was solemnised, nor may any evidence of his want of authority be given¹².

The above provisions do not apply to members of Canadian, Australian or New Zealand¹³ forces other than members of those forces who are temporarily attached¹⁴ to United Kingdom forces¹⁵; but any law of any of those countries which makes corresponding provisions as to forces of that country may be given effect by Order in Council as part of the law of the United Kingdom¹⁶.

1 le a territory other than:

69 (1) any part of Her Majesty's dominions; or

70 (2) any British protectorate; or

71 (3) any other country or territory under Her Majesty's protection or suzerainty or in which Her Majesty has for the time being jurisdiction;

but Her Majesty may by Order in Council direct that any British protectorate or any other country or territory within head (3) supra or any part of Her Majesty's dominions which has been occupied by a state at war with Her Majesty and in which facilities for marriage under local law have not been adequately restored may be treated as foreign territory: Foreign Marriage Act 1892 s 22(2) (s 22 substituted by the Foreign Marriage Act 1947 s 2). At the date at which this volume states the law, no Order in Council was in force for this purpose. Ships for the time being in the waters of a foreign territory are included in references to foreign territory: see the Foreign Marriage Act 1892 s 22(3) (as so substituted). Any Order in Council made under s 22 (as substituted) may be varied or revoked by a subsequent Order in Council; and any Order in Council under s 22 (as substituted) must be forthwith laid before each House of Parliament: s 22(6) (as so substituted). As to Her Majesty's dominions see COMMONWEALTH vol 13 (2009) PARA 707. Note that there are no longer any British protectorates: see COMMONWEALTH vol 13 (2009) PARA 708.

2 This excludes a marriage solemnised by a chaplain of a foreign army corps which is not operating directly under British command: *Taczanowska (otherwise Roth) v Taczanowski* [1957] P 301 at 320, [1957] 2 All ER 563 at 568, CA. As to Her Majesty's forces see ARMED FORCES.

3 This includes persons serving in ships in foreign waters: Foreign Marriage Act 1892 s 22(3) (as substituted: see note 1 supra). Banns of a marriage to be solemnised in England may be published on a British warship: Marriage Act 1949 s 14 (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 74). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 For the meaning of 'United Kingdom' see para 4 ante.

5 Foreign Marriage Act 1892 s 22(1) (as substituted: see note 1 supra). See also ARMED FORCES. As to the position at common law regarding marriage within the British army abroad see *R v Brompton Inhabitants* (1808) 10 East 282; *Burn v Farrar* (1819) 2 Hag Con 369; *Waldegrave Peerage Case* (1837) 4 Cl & Fin 649, HL.

6 This includes persons employed in ships in foreign waters: Foreign Marriage Act 1892 s 22(3) (as substituted: see note 1 supra).

7 For this purpose, employment in a prescribed capacity is employment involving the performance of administrative, executive, judicial, clerical, typing, duplicating, machine operating, paper keeping, messengerial, professional, instructional, scientific, experimental, technical, industrial or labouring functions, if it is carried out by persons serving Her Majesty or otherwise employed in the territory where the marriage is solemnised, who are civilians subject to military, air force or naval law when not on active service by virtue of the Army Act 1955 Pt II (ss 24-143) (as amended), the Air Force Act 1955 Pt II (ss 24-143) (as amended) or the Naval Discipline Act 1957: Foreign Marriage (Armed Forces) Order 1964, SI 1964/1000, arts 1, 2 (both substituted by SI 1990/2592). See ARMED FORCES. As to the making of Orders in Council under the Foreign Marriage Act 1892 s 22 (as substituted) see note 1 supra.

8 For the purpose of determining whether one person is the child of another, it is immaterial whether the person's mother and father were at any time married to each other, and any person who is or was treated by another as a child of the family in relation to any marriage to which that other is or was a party must be regarded as his child: *ibid* s 22(1B) (s 22 as substituted (see note 1 supra); s 22(1B) added by the Foreign Marriage (Amendment) Act 1988 s 6).

9 Foreign Marriage Act 1892 s 22(1A) (s 22 as substituted (see note 1 supra); s 22(1A) added by the Foreign Marriage (Amendment) Act 1988 s 6). A certificate from the commander in the territory where the party is serving must be produced to the chaplain, stating that the commander has no objection and giving particulars of the party: see the Foreign Marriage (Armed Forces) Order 1964, SI 1964/1000, arts 3(a), (b), 4. Certificates may be necessary in respect of each party: art 3(a) proviso. The marriage must be celebrated in the presence of not less than two witnesses: art 3(c). 'The commander in the territory' means, where a party to the marriage is a member of the naval forces or a person employed in any of the capacities mentioned in note 7 supra, the officer commanding the naval forces of Her Majesty in the territory; where a party to the marriage is a member of the military or air forces, it means the officer commanding the military or air forces of Her Majesty in the territory: art 4.

10 See *Taczanowska (otherwise Roth) v Taczanowski* [1957] P 301 at 319-320, [1957] 2 All ER 563 at 567-568, CA.

11 See the Foreign Marriage Act 1892 s 22(4) (as substituted (see note 1 supra); amended by the Foreign Marriage (Amendment) Act 1988 s 7, Schedule); and the Foreign Marriage (Armed Forces) Order 1964, SI 1964/1000, art 5. See also the Registration of Births, Deaths and Marriages (Special Provisions) Act 1957 s 1; and the Service Departments Registers Order 1959, SI 1959/406 (amended by SI 1963/1624; SI 1988/1295).

12 Foreign Marriage Act 1892 s 22(5) (as substituted: see note 1 supra).

13 The Foreign Marriage Act 1947 refers to a Dominion within the meaning of the Statute of Westminster 1931: Foreign Marriage Act 1947 s 3(3) (amended by the Newfoundland (Consequential Provisions) Act 1950 s 1(2), Schedule Pt II). This is now an obsolete term, but the countries referred to are, in effect, Australia, Canada and New Zealand: see COMMONWEALTH vol 13 (2009) PARA 707.

14 *Ie* under the Visiting Forces (British Commonwealth) Act 1933 s 4(2) (as amended) (see ARMED FORCES): Foreign Marriage Act 1947 s 3(1) proviso.

15 *Ibid* s 3(1).

16 *Ibid* s 3(2). Such provision has been made in relation to New Zealand and Australia: Foreign Marriage (Armed Forces) Order 1964, SI 1964/1000, art 6, Sch 1 (substituted by SI 1965/137).

UPDATE

214 Marriages by chaplains of Her Majesty's forces

TEXT AND NOTES 6-9--Foreign Marriage Act 1892 s 22(1A) amended, s 22(1AA) added:
Armed Forces Act 2006 Sch 16 para 5.

NOTE 7--SI 1964/1000 arts 1, 2 amended: SI 2009/2054.

NOTE 8--Foreign Marriage Act 1892 s 22(1B) substituted: SI 2005/3129.

NOTE 11--SI 1959/406 further amended: SI 2005/3186, SI 2007/908, SI 2009/1736.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/B. EXCEPTIONS TO GENERAL PRINCIPLE/215. Marriages under the Foreign Marriage Act 1892.

215. Marriages under the Foreign Marriage Act 1892.

A marriage solemnised in the manner provided by the Foreign Marriage Act 1892¹ in any foreign² country or place, by or before a marriage officer³, between parties of whom at least one is a United Kingdom national⁴, is as valid as if it had been solemnised in the United Kingdom⁵ with a due observance of all forms required by law⁶, even though it may be invalid by the *lex loci celebrationis*⁷.

1 The Foreign Marriage Act 1892 has been amended by the Foreign Marriage Act 1947 and by the Foreign Marriage (Amendment) Act 1988. See the Foreign Marriage Order 1970, SI 1970/1539 (amended by SI 1990/598). See also the Foreign Marriage (Armed Forces) Order 1964, SI 1964/1000 (amended by SI 1965/137; SI 1990/2592); and para 214 ante.

The Acts do not apply to marriages of members of the royal family: Foreign Marriage Act 1892 s 23. Such marriages, wherever they take place, are governed by the Royal Marriages Act 1772: see *Sussex Peerage Case* (1844) 11 Cl & Fin 85, HL; and CROWN AND ROYAL FAMILY vol 12(1) (Reissue) para 36.

As to marriages under the Foreign Marriage Act 1892 s 22 (as substituted and amended) see para 214 ante.

By the Marriage of British Subjects (Facilities) Act 1915 and the Marriage of British Subjects (Facilities) Amendment Act 1916, provision is made for facilitating marriages between holders of British nationality resident in the United Kingdom and holders of British nationality resident in other parts of Her Majesty's dominions or in British protectorates: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 17, 114. As to Her Majesty's dominions see COMMONWEALTH vol 13 (2009) PARA 707. Note that there are no longer any British protectorates: see COMMONWEALTH vol 13 (2009) PARA 708.

2 Ie presumably outside the Commonwealth. See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 664. As to the Commonwealth see COMMONWEALTH vol 13 (2009) PARA 701.

3 'Marriage officer' means a British ambassador (including a minister and a chargé d'affaires: Foreign Marriage Act 1892 s 24) residing in the country to whose government he is accredited, or any officer prescribed by marriage regulations as an officer for solemnising marriages in the official house of such an ambassador, or a British consul (ie a consul-general, consul, vice-consul, pro-consul and consular agent: s 24), governor, high commissioner, resident, consular or other officer, or any person appointed in pursuance of the marriage regulations to act in place of a high commissioner or resident, provided that he holds a marriage warrant signed by the Secretary of State, or any officer authorised by the marriage regulations to act as marriage officer without any marriage warrant: s 11(1), (2). As to the Secretary of State see para 126 note 1 ante. As to the making of marriage regulations see s 21 (amended by the Foreign Marriage Act 1947 s 4; the Statute Law (Repeals) Act 1986; and the Foreign Marriage (Amendment Act) 1988 ss 1(3), 7(2), Schedule). No marriage regulations for this purpose were in force at the date at which this volume states the law, and accordingly a marriage warrant is in every case necessary.

If a marriage warrant refers to the office without designating the name of any particular person holding it, then, while the warrant is in force, the person for the time being holding or acting in that office is a marriage officer: Foreign Marriage Act 1892 s 11(3).

A Secretary of State may by warrant under his hand vary or revoke any marriage warrant previously issued under the Foreign Marriage Act 1892: s 11(4).

4 For these purposes, 'United Kingdom national' means a person who is:

72 (1) a British citizen, a British overseas territories citizen, a British overseas citizen or a British national (overseas) (Foreign Marriage Act 1892 ss 1(2)(a), 24 (s 1(2) added by the Foreign Marriage (Amendment) Act 1988 s 1(2); the Foreign Marriage Act 1892 s 1(2)(a) amended by the British Overseas Territories Act 2002 s 2(3); and the Foreign Marriage Act 1892 s 24 amended by the Foreign Marriage (Amendment) Act 1988 s 1(4)); or

73 (2) a British subject under the British Nationality Act 1981 (Foreign Marriage Act 1892 s 1(2)(b) (as so added), s 24 (as so amended)); or

- 74 (3) a British protected person within the meaning of the British Nationality Act 1981 (Foreign Marriage Act 1892 s 1(2)(c) (as so added), s 24 (as so amended));

As to categories of citizenship see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 23 et seq.

- 5 For the meaning of 'United Kingdom' see para 4 ante.

- 6 Foreign Marriage Act 1892 s 1(1) (amended by the Foreign Marriage (Amendment) Act 1988 s 1). The marriage is thus formally valid, although not necessarily valid in other respects: Foreign Marriage Act 1892 s 23.

- 7 *Hay v Northcote* [1900] 2 Ch 262, where a marriage celebrated in accordance with the Consular Marriage Act 1849 (repealed and virtually re-enacted by the Foreign Marriage Act 1892) was held to be valid although it had been annulled by the court of the parties' domicile. The foreign nullity decree might now be recognised in the United Kingdom: see para 254 et seq post. See also *Merker v Merker* [1963] P 283 at 299-300, [1962] 3 All ER 928 at 936. As to the *lex loci celebrationis* see para 208 ante.

UPDATE

215-223 Marriages under the Foreign Marriage Act 1892 ... Effect of non-compliance with the statutory requirements

See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 119 et seq.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/B. EXCEPTIONS TO GENERAL PRINCIPLE/216. Notice of intended marriage.

216. Notice of intended marriage.

Where a marriage is intended to be solemnised under the Foreign Marriage Act 1892¹, one of the parties must sign a notice stating the name, surname, profession, condition and residence of each of the parties and whether each is or is not a minor, and give it to the marriage officer² within whose district³ both parties have resided for not less than one week immediately preceding the notice, stating in the notice that they have so resided⁴. The marriage officer must file the notice in his registry, and, on payment of the proper fee⁵, enter it in his book of notices, and keep a true copy of the notice posted up in some conspicuous place in his office⁶ for 14 consecutive days before the marriage is solemnised⁷. If the marriage is not solemnised within three months of the date on which notice for it has been given to and entered by the marriage officer⁸ the notice is void, and the marriage cannot be solemnised under it⁹.

In special cases, where the Secretary of State is satisfied that for some good cause the requirements of the Act as to residence and notice cannot be complied with, and he is satisfied that the intended marriage is not clandestine and that adequate public notice has been given in the place or places where each of the parties resided not less than 15 days immediately preceding the giving of the notice, he may authorise the marriage officer to dispense with those requirements¹⁰.

1 See para 215 ante.

2 For the meaning of 'marriage officer' see para 215 note 3 ante.

3 The area within which the duties of his office are exercisable, or any such lesser area as is assigned by the marriage warrant or any other warrant of a Secretary of State, or is fixed by the marriage regulations: Foreign Marriage Act 1892 s 11(1). As to marriage warrants see para 215 note 3 ante. As to the making of marriage regulations see s 21 (amended by the Foreign Marriage Act 1947 s 4; the Statute Law (Repeals) Act 1986; and the Foreign Marriage (Amendment) Act 1988 ss 1(3), 7(2), Schedule). No marriage regulations for this purpose were in force at the date at which this volume states the law. As to the Secretary of State see para 126 note 1 ante.

4 Foreign Marriage Act 1892 s 2. For a form of notice of marriage see the Foreign Marriage Order 1970, SI 1970/1539, art 8, Schedule Form 1.

5 The proper fee is such as is fixed under the Consular Fees Act 1980; and the fee so fixed as respects a consul is the fee which may be taken by any marriage officer. The provisions of the Consular Fees Act 1980 relating to the levying, application and remission of and accounting for fees are the same when the marriage officer taking the fee is not a consul: Foreign Marriage Act 1892 s 20 (amended by the Consular Fees Act 1980 s 1(5)). As to the levying, application and remission of, and accounting for, fees see the Consular Fees Act 1980 s 1(3); and the Consular Fees Regulations 1981, SI 1981/476. As to the fees payable see the Consular Fees (No 2) Order 1999, SI 1999/3132.

6 As to the office of a marriage officer see further para 221 note 5 post.

7 Foreign Marriage Act 1892 s 3(1). The book of notices and copy of the notice posted up must be open at all reasonable times, without fee, to the inspection of any person: s 3(2).

8 Ibid s 6(a). If, on a caveat being entered (see para 219 post), a statement has been transmitted to a Secretary of State, or if an appeal has been made to a Secretary of State (see para 218 post), the three months run from the date of the receipt from the Secretary of State of a decision directing the marriage to be solemnised: s 6(b).

9 Ibid s 6.

10 Foreign Marriage Order 1970, SI 1970/1539, art 4(1). As to the oath before marriage in such circumstances see para 220 note 5 post.

UPDATE

215-223 Marriages under the Foreign Marriage Act 1892 ... Effect of non-compliance with the statutory requirements

See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 119 et seq.

216 Notice of intended marriage

NOTE 5--SI 1999/3132 now replaced by Consular Fees Order 2009, SI 2009/700.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/B. EXCEPTIONS TO GENERAL PRINCIPLE/217. Consents.

217. Consents.

The same consents are required, under the Foreign Marriage Act 1892¹, to a marriage of a party domiciled in England or in a country outside the United Kingdom² as would be required in respect of that party to a marriage solemnised in England on the authority of a superintendent registrar's certificate³. The same consents are required, under the Act, to the marriage of a party domiciled in Northern Ireland as would be required in respect of that party to a marriage solemnised there⁴. No consent is required to a marriage under the Act in respect of a party domiciled in Scotland⁵.

Where by reason of the absence, inaccessibility or disability of a person whose consent is required that consent cannot be obtained, the requirement of obtaining the consent may be dispensed with by the Secretary of State or, in such cases as may be prescribed by marriage regulations⁶, the Registrar General for England and Wales⁷.

A person whose consent is required may forbid the marriage by an entry to this effect in the marriage officer's book of notices of marriage⁸. The effect of such an entry is to render the notice void, and the marriage cannot be solemnised under it⁹.

1 See para 215 ante.

2 For the meaning of 'United Kingdom', and as to the meanings of 'England', 'English' and 'English law', see para 4 ante.

3 Foreign Marriage Act 1892 s 4(1) (s 4 substituted by the Foreign Marriage (Amendment) Act 1988 s 2(1)). As to the consents required by English domestic law see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 41 et seq. The certificate referred to in the text is a certificate issued by a superintendent registrar under the Marriage Act 1949 Pt III (ss 26-52) (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 54, 87 et seq.

4 Foreign Marriage Act 1892 s 4(2) (as substituted: see note 3 supra). Note, however, that consent may be dispensed with by order under Northern Ireland legislation, on application to a county court in Northern Ireland: see s 4(5) (as so substituted).

5 Ibid s 4(3) (as substituted: see note 3 supra).

6 As to the making of marriage regulations see ibid s 21 (amended by the Foreign Marriage Act 1947 s 4; the Statute Law (Repeals) Act 1986; and the Foreign Marriage (Amendment Act) 1988 ss 1(3), 7(2), Schedule). No marriage regulations for this purpose were in force at the date at which this volume states the law. As to the Secretary of State see para 126 note 1 ante.

7 Foreign Marriage Act 1892 s 4(4) (as substituted: see note 3 supra). As to the office of Registrar General for England and Wales see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 605 et seq.

8 See ibid s 4(6) (as substituted: see note 3 supra). He must write the word 'forbidden' against the entry of the intended marriage in the book of notices and add his name and address and a statement of the capacity by virtue of which his consent is required: s 4(6)(a), (b) (as so substituted).

9 Ibid s 4(6) (as substituted: see note 3 supra).

UPDATE

215-223 Marriages under the Foreign Marriage Act 1892 ... Effect of non-compliance with the statutory requirements

See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 119 et seq.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/B. EXCEPTIONS TO GENERAL PRINCIPLE/218. Refusal of solemnisation of marriage.

218. Refusal of solemnisation of marriage.

Before a marriage is solemnised in a foreign country under the Foreign Marriage Act 1892¹, the marriage officer² must be satisfied that:

- 190 (1) at least one of the parties is a United Kingdom national³;
- 191 (2) the authorities of the foreign country will not object to the solemnisation of the marriage;
- 192 (3) insufficient facilities exist for the marriage of the parties under the law of that country; and
- 193 (4) the parties will be regarded as validly married by the law of the country in which each party is domiciled⁴.

The marriage officer is not required to solemnise a marriage, or to allow it to be solemnised in his presence, if in his opinion its solemnisation would be inconsistent with international law or the comity of nations⁵.

If the marriage officer refuses to solemnise the marriage of any person requiring it to be solemnised, or to allow it to be solemnised in his presence, by reason of any of the provisions described above, that person has a right of appeal to a Secretary of State, who must give the marriage officer his decision on the appeal⁶. The marriage officer must forthwith inform the parties of, and conform to, the Secretary of State's decision⁷.

1 See para 215 ante.

2 For the meaning of 'marriage officer' see para 215 note 3 ante.

3 For the meaning of 'United Kingdom national' see para 215 note 4 ante.

4 Foreign Marriage Order 1970, SI 1970/1539, art 3(1) (amended by SI 1990/598).

5 Foreign Marriage Act 1892 s 19.

6 Ibid ss 5(3), 19 proviso; Foreign Marriage Order 1970, SI 1970/1539, art 3(2). As to the Secretary of State see para 126 note 1 ante.

7 Foreign Marriage Act 1892 s 5(4) (amended by the Foreign Marriage (Amendment) Act 1988 s 3(2)).

UPDATE

215-223 Marriages under the Foreign Marriage Act 1892 ... Effect of non-compliance with the statutory requirements

See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 119 et seq.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/B. EXCEPTIONS TO GENERAL PRINCIPLE/219. Objections.

219. Objections.

On payment of the proper fee¹ any person may enter with the marriage officer² a caveat, signed by him or on his behalf and stating his residence and the ground of his objection against the solemnisation of the marriage of any named person, and thereupon the marriage cannot be solemnised until either the marriage officer has examined the matter and is satisfied that the caveat ought not to obstruct solemnisation of the marriage, or the caveat has been withdrawn by the person entering it³. In a case of doubt the marriage officer may transmit a copy of the caveat with such statement respecting it as he thinks fit to the Secretary of State, who must refer it to the Registrar General for whichever part of the United Kingdom he considers appropriate⁴; and the Registrar General must give his decision in writing to the Secretary of State, who must communicate it to the marriage officer⁵. The marriage officer must forthwith inform the parties of, and conform to, the decision of the Registrar General⁶.

1 As to the proper fee see para 216 note 5 ante.

2 For the meaning of 'marriage officer' see para 215 note 3 ante.

3 Foreign Marriage Act 1892 s 5(1).

4 As to the Registrar General for England and Wales, the Registrar General of Births, Deaths and Marriages for Scotland or the Registrar General in Northern Ireland: *ibid* s 5(2) (amended by the Foreign Marriage (Amendment) Act 1988 s 3(1)). As to the office of Registrar General for England and Wales see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 605 et seq. As to the Secretary of State see para 126 note 1 ante.

5 Foreign Marriage Act 1892 s 5(2) (as amended: see note 4 supra).

6 *Ibid* s 5(4) (amended by the Foreign Marriage (Amendment) Act 1988 s 3(2)).

UPDATE

215-223 Marriages under the Foreign Marriage Act 1892 ... Effect of non-compliance with the statutory requirements

See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 119 et seq.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/B. EXCEPTIONS TO GENERAL PRINCIPLE/220. Oath before marriage.

220. Oath before marriage.

Before a marriage is solemnised under the Foreign Marriage Act 1892¹, each of the parties must appear before the marriage officer² and make and subscribe an oath in a book kept by the officer for the purpose³:

- 194 (1) that he or she believes that there is no impediment to the marriage by reason of kindred or alliance or otherwise⁴;
- 195 (2) that they have both for the immediately preceding three weeks had their usual residence within the marriage officer's district⁵; and
- 196 (3) where either party is under the age of 18 and domiciled in a country other than Scotland:

13

- 19. (a) that any necessary consent has been obtained; or
- 20. (b) that the necessity of obtaining consent has been dispensed with; or
- 21. (c) if the party is domiciled in England or a country outside the United Kingdom⁶, either that he or she is a widow or widower or that there is no person having authority to give such consent⁷.

14

1 See para 215 ante.

2 For the meaning of 'marriage officer' see para 215 note 3 ante.

3 Foreign Marriage Act 1892 s 7.

4 Ibid s 7(a).

5 Ibid s 7(b). This part of the oath must be omitted in cases where, under the Foreign Marriage Order 1970, SI 1970/1539, art 4(1), the Secretary of State has authorised the marriage officer to dispense with the requirements of the Foreign Marriage Act 1892 as to residence and notice (see para 216 text and note 10 ante): Foreign Marriage Order 1970, SI 1970/1539, art 4(2). As to the Secretary of State see para 126 note 1 ante.

6 For the meaning of 'United Kingdom', and as to the meanings of 'England', 'English' and 'English law', see para 4 ante.

7 Foreign Marriage Act 1892 s 7(c) (substituted by the Foreign Marriage (Amendment) Act 1988 s 2(2)). For a form of oath see the Foreign Marriage Order 1970, SI 1970/1539, art 8, Schedule Form 2. As to consents see para 217 ante.

UPDATE

215-223 Marriages under the Foreign Marriage Act 1892 ... Effect of non-compliance with the statutory requirements

See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 119 et seq.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/B. EXCEPTIONS TO GENERAL PRINCIPLE/221. Solemnisation of marriage.

221. Solemnisation of marriage.

After the expiration of 14 days after notice of an intended marriage has been entered¹, if no lawful impediment to the marriage is shown to the satisfaction of the marriage officer² and the marriage has not been forbidden³, it may be solemnised under the Foreign Marriage Act 1892⁴. It must be solemnised at the official house of the marriage officer⁵, with open doors, between the hours of 8 am and 6 pm in the presence of two or more witnesses, either by the marriage officer or, if the parties so desire, by some other person in his presence, according to such form and ceremony as the parties see fit to adopt⁶. If a corresponding declaration is not otherwise included in the form adopted by the parties, each party must, in some part of the ceremony and in the presence of the marriage officer, declare that he or she knows of no lawful impediment to the marriage⁷ and that he or she takes the other as lawful wedded wife or husband⁸.

1 See para 216 ante.

2 See para 220 ante. For the meaning of 'marriage officer' see para 215 note 3 ante.

3 See para 217 ante.

4 Foreign Marriage Act 1892 s 8(1). The marriage officer is entitled to a proper fee: s 9(1). As to the proper fee see also para 216 note 5 ante.

5 'Official house of the marriage officer' means the office at which the officer's business is transacted, and the official house of residence of that officer, and, in the case of any officer who is an officer for solemnising marriages in the official house of an ambassador, the ambassador's official house: Foreign Marriage Act 1892 s 24. Every place within the curtilage or precincts of the building which is for the time being used for the purpose of the marriage officer's office is part of his official house, and every place to which the public have ordinary access in that official house is deemed to be part of the office: Foreign Marriage Order 1970, SI 1970/1539, art 5. The certificate of a Secretary of State as to any house, office, chapel, or other place being, or being part of, the official house of a British ambassador or consul is conclusive: Foreign Marriage Act 1892 s 16(2). As to the Secretary of State see para 126 note 1 ante.

6 Ibid s 8(2) (substituted by the Foreign Marriage (Amendment) Act 1988 s 4).

7 See the Foreign Marriage Act 1892 s 8(3) (substituted by the Foreign Marriage (Amendment) Act 1988 s 4).

8 See the Foreign Marriage Act 1892 s 8(4) (added by the Foreign Marriage (Amendment) Act 1988 s 4).

UPDATE

215-223 Marriages under the Foreign Marriage Act 1892 ... Effect of non-compliance with the statutory requirements

See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 119 et seq.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/B. EXCEPTIONS TO GENERAL PRINCIPLE/222. Registration and proof of marriage.

222. Registration and proof of marriage.

The marriage officer¹ must forthwith register in duplicate a marriage solemnised under the Foreign Marriage Act 1892² in two marriage register books³, according to the form provided by law for the registration of marriages in England⁴, or as near to that form as the difference of circumstances permits⁵. In January of each year the marriage officer must forward to a Secretary of State, for transmission to the Registrar General for England and Wales, a certified copy of all the entries of marriage made in the register book during the preceding year, or if there has been no entry during that year, a certificate of that fact⁶.

The marriage is proved by production of the official certificate of marriage⁷. After a marriage has been solemnised it is not necessary, in support of the marriage, to give any proof of the requisite residence of either of the parties prior to the marriage, or of the consent of any person whose consent was required by law, and evidence to the contrary may not be given in any legal proceeding touching the validity of the marriage⁸. Where a marriage purports to have been solemnised and registered under the Act in the official house of a British ambassador or consul⁹, it is not necessary in support of the marriage to give any proof of the authority of the marriage officer by or before whom the marriage was solemnised and registered, and evidence of his want of authority¹⁰ may not be given in any such proceeding¹¹.

1 For the meaning of 'marriage officer' see para 215 note 3 ante.

2 See para 221 ante.

3 The register books must be furnished to him from time to time by the Registrar General for England and Wales, through a Secretary of State: Foreign Marriage Act 1892 s 9(2) (amended by the Foreign Marriage (Amendment) Act 1988 s 5(1)). As to the office of Registrar General for England and Wales see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 605 et seq.

4 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

5 Foreign Marriage Act 1892 s 9(2) (as amended: see note 3 supra). Every entry must be signed by the marriage officer (or by the person solemnising the marriage if other than that officer), by both parties and by two witnesses: s 9(3). Entries must be in regular order from the beginning to the end of the book, and the number of the entry in each duplicate must be the same: s 9(4). The marriage officer may ask the parties for the required particulars: s 9(5).

6 Ibid s 10(1) (amended by the Foreign Marriage (Amendment) Act 1988 s 5(1)). As to the Secretary of State see para 126 note 1 ante. Every copy must be certified, and certificate given, under the marriage officer's hand and official seal: Foreign Marriage Act 1892 s 10(1) (as so amended). For a form of certificate see the Foreign Marriage Order 1970, SI 1970/1539, art 8, Schedule, Form 3. If either party is shown in a copy of a certificate received by the Registrar General for England and Wales to be from Scotland or Northern Ireland, that Registrar General must send a copy entry to the appropriate Registrar General in Scotland or Northern Ireland: art 6(1) (so numbered by SI 1990/598). The marriage officer must keep the duplicate books until they are filled, and then send one to the Secretary of State for transmission to the Registrar General for England and Wales: Foreign Marriage Act 1892 s 10(2) (amended by the Foreign Marriage (Amendment) Act 1988 s 5(1)).

Where a marriage officer has no seal of office, reference to the official seal must be construed as reference to any seal ordinarily used by him, if authenticated by his signature with his official name and description: Foreign Marriage Act 1892 s 11(5).

7 The provisions and penalties of the Marriage Registration Acts relating to any registrar or register of marriages, or certified copies, extend to marriage officers and their registers and certified copies, so far as applicable: Foreign Marriage Act 1892 s 17. 'Marriage Registration Acts' means enactments for the time being in force in England relating to the registration of marriages: Foreign Marriage Act 1892 s 17 (definition added by

the Foreign Marriage (Amendment) Act 1988 s 5(2)). Any books, notices or documents directed to be kept by a marriage officer are documents of such a public nature as to be admissible in evidence on mere production from his custody: Foreign Marriage Act 1892 s 16(1). See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW; REGISTRATION CONCERNING THE INDIVIDUAL.

8 Ibid s 13(1). As to the requirements of residence see paras 216, 220 ante. As to the necessary consents see para 217 ante.

9 As to the meaning of 'ambassador', and for the meaning of 'consul', see para 215 note 3 ante.

10 Ie whether by reason of his not being duly authorised, or of any prohibitions or restrictions under the marriage regulations or otherwise: Foreign Marriage Act 1892 s 13(2).

11 Ibid s 13(2) (amended by the Foreign Marriage Act 1947 s 4). Cf *Watts (otherwise Carey) v Watts* (1922) 38 TLR 430.

UPDATE

215-223 Marriages under the Foreign Marriage Act 1892 ... Effect of non-compliance with the statutory requirements

See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 119 et seq.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/B. EXCEPTIONS TO GENERAL PRINCIPLE/223. Effect of non-compliance with the statutory requirements.

223. Effect of non-compliance with the statutory requirements.

The requirements of the Foreign Marriage Act 1892 as to notices¹, consents², the oath before marriage³ and registration of the marriage⁴ are directory only and not mandatory, so that a marriage solemnised under the Act may be valid even if these requirements have not been complied with⁵. On the other hand, the requirements of the Act as to the solemnisation of the marriage⁶ are crucial, and they must be complied with in order for the marriage to be valid⁷.

1 See para 216 ante.

2 See para 217 ante.

3 See para 220 ante.

4 See para 222 ante.

5 *Collett v Collett* [1968] P 482, [1967] 2 All ER 426.

6 See para 221 ante.

7 *Collett v Collett* [1968] P 482, [1967] 2 All ER 426.

UPDATE

215-223 Marriages under the Foreign Marriage Act 1892 ... Effect of non-compliance with the statutory requirements

See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 119 et seq.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/C. MISCELLANEOUS PROVISIONS/224. Registration of foreign marriages celebrated under local law.

C. MISCELLANEOUS PROVISIONS

224. Registration of foreign marriages celebrated under local law.

If satisfied by personal attendance that a marriage between parties of whom one at least is a United Kingdom national¹ has been duly solemnised in accordance with the local law of a foreign country², a British consul³ or person authorised to act as such may, on payment of the proper fee⁴, register the marriage in accordance with the marriage regulations⁵ as having been so solemnised⁶, although registration gives it no more validity than it would otherwise have⁷.

1 For the meaning of 'United Kingdom national' see para 215 note 4 ante.

2 Ie presumably outside the Commonwealth: see para 215 note 2 ante. As to the Commonwealth see COMMONWEALTH vol 13 (2009) PARA 701.

3 For the meaning of 'consul' see para 215 note 3 ante.

4 As to the proper fee see paras 216 note 5, 221 note 4 ante.

5 As to the making of marriage regulations see the Foreign Marriage Act 1892 s 21 (amended by the Foreign Marriage Act 1947 s 4; the Statute Law (Repeals) Act 1986; and the Foreign Marriage (Amendment Act) 1988 ss 1(3), 7(2), Schedule). No marriage regulations for this purpose were in force at the date at which this volume states the law.

6 On registration the Foreign Marriage Act 1892 applies as if the marriage had been registered in pursuance of the Act (see para 222 ante): s 18(1).

7 Ibid s 18(1) (amended by the Foreign Marriage (Amendment) Act 1988 s 1(3)(a)).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/C. MISCELLANEOUS PROVISIONS/225. Registration of foreign marriage certificates.

225. Registration of foreign marriage certificates.

In the case of marriages between parties of whom at least one is a United Kingdom national¹ solemnised in accordance with the local law of a foreign country², at which a British consul³ or person authorised to act as British consul has not attended⁴, provision may be made by Order in Council⁵ for the transmission to the Registrar General for England and Wales⁶, the Registrar General for Scotland or the Registrar General for Northern Ireland of certificates of such marriages issued in accordance with local law, for the issue by the Registrar General, on payment of a fee, of certified copies of such certificates, and for enabling such copies to be received in evidence⁷.

Accordingly, where such a marriage has been so solemnised, a party to the marriage who is a United Kingdom national may produce a certified copy of the entry in the marriage register duly authenticated by the appropriate authority in that country or a marriage certificate issued by that authority, together with an English translation, to the British consul⁸ for the district in which the marriage has been solemnised or has taken place⁹; and the consul must, on request, and on payment of the appropriate fee¹⁰, if satisfied that the certificate has been duly issued and that the translation is a true one, transmit the certificate and translation, together with his own certificate as to the accuracy of the translation, to the appropriate Registrar General¹¹, who may issue a certified copy of any of these documents to any person¹². A copy of a foreign marriage certificate so issued must be received in evidence without further proof to the same extent as if it were a certificate duly issued by the authorities of the foreign country in which the marriage was celebrated¹³.

1 For the meaning of 'United Kingdom national' see para 215 note 4 ante.

2 I.e. presumably outside the Commonwealth: see para 215 note 2 ante. As to the Commonwealth see COMMONWEALTH vol 13 (2009) PARA 701.

3 For the meaning of 'consul' see para 215 note 3 ante.

4 See the text and notes 8-13 infra.

5 Any Order in Council may be varied or revoked by a subsequent Order in Council; and any such Order must be laid forthwith before each House of Parliament: Foreign Marriage Act 1892 s 18(3) (added by the Foreign Marriage Act 1947 s 6).

6 As to the office of Registrar General for England and Wales see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 605 et seq.

7 Foreign Marriage Act 1892 s 18(2) (added by the Foreign Marriage Act 1947 s 6).

8 In the absence of such an officer, the proper person is the appropriate consul of any other government which has undertaken consular representation in the district on behalf of Her Majesty's government in the United Kingdom: Foreign Marriage Order 1970, SI 1970/1539, art 7(1) (amended by SI 1990/598). For the meaning of 'United Kingdom' see para 4 ante.

9 Foreign Marriage Order 1970, SI 1970/1539, art 7(1) (as amended: see note 8 supra).

10 As to the proper fee see para 216 note 5 ante.

11 Foreign Marriage Order 1970, SI 1970/1539, art 7(1) (as amended: see note 8 supra). In the case of a certificate relating to a party shown to be from Scotland or Northern Ireland, the documents must be sent to the Registrar General for Scotland or Northern Ireland: art 7(1) (as so amended).

12 See *ibid* art 7(2).

13 *Ibid* art 7(3).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(i) Formalities of Marriage/C. MISCELLANEOUS PROVISIONS/226. Certificate of no impediment to marriage.

226. Certificate of no impediment to marriage.

A holder of British nationality¹ who desires to be married in a foreign² country to a foreigner according to the law of that country may, if it is desired for the purpose of complying with the law of the foreign country to obtain a certificate that after proper notices have been given no legal impediment to the marriage has been shown to exist, give notice of the marriage:

- 197 (1) if he is resident in any part of the United Kingdom³ other than Scotland, to a superintendent registrar of marriages⁴; or
- 198 (2) if he is resident abroad, to the marriage officer⁵,

and apply to the registrar or marriage officer for such certificate⁶. After certain conditions⁷ have been complied with, the registrar or marriage officer must give the certificate unless it is forbidden⁸ or a caveat is in operation⁹, or some legal impediment to the marriage is shown to exist¹⁰.

Where arrangements have been made to the satisfaction of Her Majesty with any foreign country for the issue by the proper officers of that country, in the case of persons subject to the marriage law of that country proposing to marry holders of British nationality in any part of the United Kingdom except Scotland, of certificates that, after proper notices have been given, no legal impediment has been shown to exist to the marriage, regulations may be made by Order in Council:

- 199 (a) requiring such a person to give notice of the fact that he is subject to the marriage law of that country to the person by whom or in whose presence the marriage is to be solemnised; and
- 200 (b) forbidding any person to whom such notice is given to solemnise the marriage or to allow it to be solemnised until such a certificate is produced to him¹¹.

Her Majesty may by Order in Council make general regulations prescribing forms to be used for these purposes and making such other provisions as seem necessary or expedient, and may by Order in Council revoke, alter or add to any previous such Order in Council¹².

1 The Marriage with Foreigners Act 1906 refers to 'British subjects' but by virtue of the British Nationality Act 1981 s 51(1) such references should now be taken to be references to 'Commonwealth citizens': see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) paras 9, 11, 66.

2 Ie presumably outside the Commonwealth: see para 215 note 2 ante. As to the Commonwealth see COMMONWEALTH vol 13 (2009) PARA 701.

3 For the meaning of 'United Kingdom' see para 4 ante.

4 See the Marriage with Foreigners Act 1906 s 4.

5 Ie a marriage officer for the time being under the Foreign Marriage Act 1892, including a person empowered under s 18 to register a foreign marriage celebrated under local law: Marriage with Foreigners Act 1906 s 4. See paras 215 note 3, 224 ante.

6 Ibid s 1(1) (amended by the Marriage (Scotland) Act 1977 ss 28(1), 29(3), Sch 2). Fees may be charged as fixed under the Consular Fees Act 1980: Marriage with Foreigners Act 1906 s 1(4) (amended by the Consular

Fees Act 1980 s 1(5)). As to the levying, application and remission of, and accounting for, fees see the Consular Fees Act 1980 s 1(3); and the Consular Fees Regulations 1981, SI 1981/476. As to the fees payable see the Consular Fees (No 2) Order 1999, SI 1999/3132.

7 The conditions are as follows:

- 75 (1) the applicant must sign a notice stating the name, surname, profession, condition, nationality and residence of each of the parties to the marriage, and whether each party is or is not a minor (Marriage with Foreigners Act 1906 s 1(1) (as amended: see note 6 supra), Schedule para 1);
- 76 (2) the applicant must at the time of giving the notice make and subscribe, in a book to be kept by the registrar or marriage officer for the purpose, an oath:
 1. (a) that he believes there to be no impediment to the marriage by reason of kindred or alliance or otherwise (Schedule para 2(a)); and
1
 2. (b) that he has for three weeks immediately preceding had his usual residence within the district of the registrar or officer (Schedule para 2(b)); and
2
 3. (c) if the applicant (not being a widow or widower) is under 18, that the consent of persons whose consent is required by law has been obtained (see note 8 infra), or that there is no person having authority to give such consent, as the case may be (Schedule para 2(c));
3
- 77 (3) the registrar or officer must file every such notice and keep it with the archives of his office, and must forthwith enter in a book of notices kept for the purpose, and post up in some conspicuous place in his office, a copy of every such notice, and must keep it so posted for at least 21 days (Schedule para 3);
- 78 (4) the book in which the notice is so entered, and the copy which is so posted, must be open at all reasonable times without fee to the inspection of any person (Schedule para 4).

8 Any person whose consent is required by law to marriages solemnised in England may forbid the certificate by writing the word 'forbidden' opposite the entry of the application in the book of notices, and by subscribing his name and residence and the character by reason of which he is authorised to forbid the certificate: *ibid* Schedule para 5.

9 Any person may enter with the registrar or officer a caveat against the granting of the certificate, signed by him or on his behalf, and stating his residence and the grounds of his objection: *ibid* Schedule para 6(a). The registrar or officer must examine into the matter of the caveat and decide whether it ought to obstruct the giving of the certificate or not, but he may if he thinks fit refer the matter to the Registrar General; if he decides the question himself, and decides that the caveat ought to obstruct the giving of the certificate, the applicant for the certificate may appeal to the Registrar General in manner provided by regulations: Schedule para 6(b). The caveat ceases to operate if it is withdrawn by the persons entering it or if it is decided by the registrar, the marriage officer or the Registrar General that it ought not to obstruct the giving of the certificate: Schedule para 6(c). As to the office of Registrar General for England and Wales see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 605 et seq.

If a person enters a caveat on grounds which the registrar, the marriage officer or the Registrar General on appeal declares to be frivolous, that person is liable to pay as a debt to the applicant such sum as the registrar, the officer or the Registrar General considers to be proper compensation for the damage caused to the applicant by the entering of the caveat: s 1(3).

10 *Ibid* s 1(1) (as amended: see note 6 supra).

11 *Ibid* s 2(1) (amended by the Marriage (Scotland) Act 1977 ss 28(1), 29(3), Sch 2). At the date at which this volume states the law, no Order in Council making such regulations had been made. If a person knowingly acts in contravention of, or fails to comply with, any such regulations, he is guilty of an offence and liable on conviction on indictment to a fine or imprisonment for up to one year: Marriage with Foreigners Act 1906 s 2(2) (amended by virtue of the Criminal Law Act 1977 s 32(1)); Courts Act 1971 s 1(2), (3).

Nothing in the Marriage with Foreigners Act 1906 s 2 (as amended) relates to a marriage between two persons professing the Jewish religion solemnised according to Jewish usage in the presence of the secretary of a synagogue authorised by what is now the Marriage Act 1949 s 53(c) or the Marriages (Ireland) Act 1844 to register such a marriage, or a deputy appointed in writing under the hand of the secretary, and approved by the president for the time being of the London committee of deputies of the British Jews by writing under his hand: Marriage with Foreigners Act 1906 s 2(3).

12 Ibid s 3. At the date at which this volume states the law, no such Order in Council had been made.

UPDATE

226 Certificate of no impediment to marriage

NOTE 6--SI 1999/3132 now replaced by Consular Fees Order 2009, SI 2009/700 (see PARA 216).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(ii) Capacity to Marry/A. LEGAL CAPACITY/227. Capacity governed by domicile.

(ii) Capacity to Marry

A. LEGAL CAPACITY

227. Capacity governed by domicile.

Capacity to marry¹ is governed by the law of each party's antenuptial domicile². Subject to certain exceptions³, a marriage is valid as regards capacity if each of the parties has, under the law of his or her antenuptial domicile, capacity to marry the other⁴; and, again subject to those exceptions, it is invalid if it is invalid under the law of either party's antenuptial domicile on the ground of that party's⁵ incapacity⁶.

As an exception to the rule described above, a marriage celebrated in England between a party domiciled in England and a party domiciled elsewhere is valid if under English domestic law each of the parties has capacity to marry the other, even if the marriage is invalid under the law of the foreign domicile on the ground of incapacity⁷.

A possible further exception to the rule is that a marriage may be invalid if it is invalid under the *lex loci celebrationis* on the ground of either party's incapacity to marry the other⁸.

1 'Capacity' here means legal capacity. As to the law governing the consent of the parties and their physical capacity see paras 232-233 post.

2 *Brook v Brook* (1858) 3 Sm & G 481 (affd (1861) 9 HL Cas 193); *Mette v Mette* (1859) 1 Sw & Tr 416 at 423; *Sottomayor v De Barros* (1877) 3 PD 1, CA; *Re Paine, Re Williams, Griffith v Waterhouse* [1940] Ch 46 at 49-50; *R v Brentwood Superintendent Registrar of Marriages, ex p Arias* [1968] 2 QB 956 at 968, [1968] 3 All ER 279 at 282, DC; *Padolecchia v Padolecchia (otherwise Leis)* [1968] P 314 at 336, [1967] 3 All ER 863 at 873; *Szechter (otherwise Karsov) v Szechter* [1971] P 286 at 295, [1970] 3 All ER 905 at 912. See also Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) Ch 17 Rule 68; and at pp 671-672 (rule approved under the number given in earlier editions of the work in *Re Paine, Re Williams, Griffith v Waterhouse* supra; *R v Brentwood Superintendent Registrar of Marriages, ex p Arias* supra; *Padolecchia v Padolecchia (otherwise Leis)* supra).

The view that legal capacity to marry is generally governed by the law of the intended matrimonial home (see *Kenward v Kenward* [1951] P 124 at 144-146, [1950] 2 All ER 297 at 309-310, CA; *Ali v Ali* [1968] P 564 at 576, [1966] 1 All ER 664 at 668; *Radwan v Radwan (No 2)* [1973] Fam 35, [1972] 3 All ER 1026) is contrary to the weight of authority. See also, however, *Perrini v Perrini* [1979] Fam 84, [1979] 2 All ER 323.

3 In addition to the exceptions set out in the text and notes 7-8 infra, there are three further exceptions:

79 (1) that concerned with remarriage after a decree of divorce or nullity of marriage granted or entitled to recognition in England (see para 230 post);

80 (2) that based on English public policy (see para 231 post); and

81 (3) that of royal marriages (see CROWN AND ROYAL FAMILY vol 12(1) (Reissue) para 36).

As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 *Re Bozzelli's Settlement, Husey-Hunt v Bozzelli* [1902] 1 Ch 751; *Re Green, Noyes v Pitkin* (1909) 25 TLR 222; *Vida v Vida* (1961) 105 Sol Jo 913; *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85, [1962] 3 All ER 873; *Alhaji Mohamed v Knott* [1969] 1 QB 1, [1968] 2 All ER 563, DC; *Schwebel v Ungar (otherwise Schwebel)* [1964] 1 OR 430, 42 DLR (2d) 622, Ont CA (on appeal [1965] SCR 148, 48 DLR (2d) 644, Can SC).

5 In *Padolecchia v Padolecchia (otherwise Leis)* [1968] P 314 at 336, [1967] 3 All ER 863 at 873, and *Szechter (otherwise Karsov) v Szechter* [1971] P 286 at 295, [1970] 3 All ER 905 at 912, it was suggested that a marriage is invalid if either party is incapable of marrying the other by the law of either party's domicile; but it

is submitted that a party's incapacity under the law of the country in which the other party only is domiciled can be relevant only in so far as it creates an incapacity in that other party. Cf *Pugh v Pugh* [1951] P 482, [1951] 2 All ER 680; *Schwebel v Ungar (otherwise Schwebel)* [1964] 1 OR 430, 42 DLR (2d) 622, Ont CA (on appeal [1965] SCR 148, 48 DLR (2d) 644, Can SC), approved in *Padolecchia v Padolecchia (otherwise Leis)* supra at 338-339 and 874-875.

6 *Brook v Brook* (1858) 3 Sm & G 481 (affd (1861) 9 HL Cas 193); *Mette v Mette* (1859) 1 Sw & Tr 416; *Chapman v Bradley* (1863) 33 Beav 61 (affd 4 De GJ & s 71); *Shaw v Gould* (1868) LR 3 HL 55; *Sottomayer v De Barros* (1877) 3 PD 1, CA; *Re De Wilton, De Wilton v Montefiore* [1900] 2 Ch 481, 69 LJCh 717; *Re Paine, Re Williams, Griffith v Waterhouse* [1940] Ch 46, 108 LJCh 427; *Pugh v Pugh* [1951] P 482, [1951] 2 All ER 680; *R v Brentwood Superintendent Registrar of Marriages, ex p Arias* [1968] 2 QB 956, [1968] 3 All ER 279, DC; *Padolecchia v Padolecchia (otherwise Leis)* [1968] P 314, [1967] 3 All ER 863; *Szechter (otherwise Karsov) v Szechter* [1971] P 286, [1970] 3 All ER 905.

7 *Sottomayer v De Barros (No 2)* (1879) 5 PD 94; *Chetti v Chetti* [1909] P 67 at 81-88; *Ogden v Ogden* [1908] P 46 at 74-77, CA; *R v Brentwood Superintendent Registrar of Marriages, ex p Arias* [1968] 2 QB 956 at 968-969, [1968] 3 All ER 279 at 282-283, DC; cf *Ramos v Ramos* (1911) 27 TLR 515.

8 *Breen (otherwise Smith) v Breen* [1964] P 144, [1961] 3 All ER 225; cf *Pugh v Pugh* [1951] P 482 at 491-492, [1951] 2 All ER 680 at 687; *Padolecchia v Padolecchia (otherwise Leis)* [1968] P 314 at 335, [1967] 3 All ER 863 at 873. Cf *Re Swan's Will* (1871) 2 VLR (IE & M) 47; *Frew (otherwise Reed) v Reed* (1969) 69 WWR 327, 6 DLR (3d) 617. See also Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 684-685, drawing a distinction in this connection between a marriage celebrated in England and a marriage celebrated in a foreign country. As to the *lex loci celebrationis* see para 208 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(ii) Capacity to Marry/A. LEGAL CAPACITY/228. Consanguinity and affinity.

228. Consanguinity and affinity.

Generally¹, a marriage is invalid if it is invalid under the law of either party's antenuptial domicile on the ground that it is within that law's prohibited degrees of consanguinity (relationship by blood)² or affinity (relationship by marriage)³. If it is not within those prohibited degrees, it is, generally⁴, valid as regards capacity notwithstanding that it is within the English prohibited degrees⁵.

1 The general rule is subject to certain exceptions: see para 227 note 3 ante.

2 *Sottomayor v De Barros* (1877) 3 PD 1, CA (foreign domicile); *Re De Wilton, De Wilton v Montefiore* [1900] 2 Ch 481 (English domicile). Cf *Peal v Peal* [1931] P 97 (British subjects domiciled in India). There is authority to suggest that the parties' intended postnuptial domicile should also be considered, so that the *lex domicilii*, upon which the essentials of a marriage depend, is defined as the law of the country in which the parties are domiciled at the time of the marriage and in which the matrimonial residence is contemplated: *Brook v Brook* (1861) 9 HL Cas 193 at 207 per Lord Campbell. However, this is the only case to come before the House of Lords where the matter has arisen for discussion.

3 *Brook v Brook* (1858) 3 Sm & G 481 (affd (1861) 9 HL Cas 193); *Mette v Mette* (1859) 1 Sw & Tr 416; *Chapman v Bradley* (1863) 33 Beav 61 (affd 4 De G & Sm 71); *Re Paine, Re Williams, Griffith v Waterhouse* [1940] Ch 46, 108 LJCh 427 (all cases of invalidity under the law of English domicile). The Marriage (Enabling) Act 1960 s 1 (as amended) does not validate a marriage if either party is, at the time of the marriage, domiciled in a country outside Great Britain, and under the law of that country there cannot be a valid marriage between the parties: s 1(3). As to the Marriage (Enabling) Act 1960 and the English prohibited degrees see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 35-40. For the meaning of 'Great Britain' see para 4 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 The general rule is subject to certain exceptions: see para 227 note 3 ante.

5 *Re Bozzelli's Settlement, Husey-Hunt v Bozzelli* [1902] 1 Ch 751 (affinity); *Re Green, Noyes v Pitkin* (1909) 25 TLR 222 (affinity); *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85, [1962] 3 All ER 873 (consanguinity).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(ii) Capacity to Marry/A. LEGAL CAPACITY/229. Lack of age.

229. Lack of age.

The law governing capacity to marry governs the impediment of lack of age¹. Generally², a marriage is invalid if it is invalid under the law of either party's antenuptial domicile on this ground³; and, generally⁴, it is valid as regards capacity if it is valid under that law notwithstanding that one or both parties is below the English minimum age of marriage⁵. As a person domiciled in England has no capacity to marry any person who is below the English minimum age of marriage⁶, a marriage where either party is under 16 is void if either party is domiciled in England⁷.

1 *Pugh v Pugh* [1951] P 482, [1951] 2 All ER 680; *Alhaji Mohamed v Knott* [1969] 1 QB 1, [1968] 2 All ER 563, DC. Cf *Padolecchia v Padolecchia (otherwise Leis)* [1968] P 314 at 340, [1967] 3 All ER 863 at 875-876. As to the age of marriage under English domestic law see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 41. As to the meaning of 'English domestic law' see para 2 note 3 ante.

2 The general rule is subject to certain exceptions: see para 227 note 3 ante.

3 *Pugh v Pugh* [1951] P 482, [1951] 2 All ER 680; *Padolecchia v Padolecchia (otherwise Leis)* [1968] P 314 at 340, [1967] 3 All ER 863 at 875-876.

4 The general rule is subject to certain exceptions: see para 227 note 3 ante.

5 *Vida v Vida* (1961) 105 Sol Jo 913; *Alhaji Mohamed v Knott* [1969] 1 QB 1, [1968] 2 All ER 563, DC. Cf the Domicile and Matrimonial Proceedings Act 1973 s 3(1), which impliedly recognises that parties may be validly married below the age of 16: see para 55 text and note 2 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

6 A marriage solemnized between persons either of whom is under the age of 16 is void: Marriage Act 1949 s 2.

7 *Pugh v Pugh* [1951] P 482, [1951] 2 All ER 680.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(ii) Capacity to Marry/A. LEGAL CAPACITY/230. Previous marriage.

230. Previous marriage.

Generally¹, a marriage is invalid if it is invalid under the law of either party's antenuptial domicile on the ground that he or she is a party to a prior subsisting marriage². This principle is, however, set aside where a divorce or annulment has been granted by a court of civil jurisdiction in any part of the United Kingdom³, or the validity of a divorce or annulment is recognised in that part, but the validity of such divorce or annulment is not recognised elsewhere⁴; in such a case, the fact that the divorce or annulment would not be recognised elsewhere does not preclude either party to the marriage from remarrying in that part of the United Kingdom or cause the remarriage of either party (wherever the remarriage takes place) to be treated as invalid in that part⁵.

1 The general rule is subject to certain exceptions: see para 227 note 3 ante.

2 *Shaw v Gould* (1868) LR 3 HL 55. This covers the position where a prior marriage is regarded as subsisting because a divorce or annulment is regarded by the law of the domicile of either party to the subsequent marriage as invalid. The strict application of this principle would, therefore, result in a situation in which a party to a divorce granted in or recognised in England could be unable to remarry because of the non-recognition of the divorce in the law of his or her domicile. The issue raises an 'incidental question' (see para 9 ante), as to, essentially, whether priority is to be given to the rules relating to capacity to marry or to those governing the recognition of divorces and annulments, and whether the *lex fori* or the *lex causae* should govern each. See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 47-50. Cf *Schwebel v Ungar (otherwise Schwebel)* [1964] 1 OR 430, 42 DLR (2d) 622, Ont CA; on appeal [1965] SCR 148, 48 DLR (2d) 644, Can SC (divorce not recognised by *lex fori* but recognised by *lex causae*). As to the *lex fori* and the *lex causae* see para 11 ante.

3 'Part of the United Kingdom' means England and Wales, Scotland or Northern Ireland: Family Law Act 1986 s 54(1). For the meaning of 'United Kingdom', and as to the meanings of 'England', 'English' and 'English law', see para 4 ante.

4 See note 2 supra; and para 253 et seq post.

5 Family Law Act 1986 s 50 (ie in these circumstances, a divorce recognised by English law as the *lex fori* takes precedence over non-recognition under the *lex causae*).

UPDATE

230 Previous marriage

TEXT AND NOTE 5--Family Law Act 1986 s 50 amended: Civil Partnership Act 2004 Sch 27 para 125.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(ii) Capacity to Marry/A. LEGAL CAPACITY/231. Public policy.

231. Public policy.

The English court¹ will not recognise an incapacity to marry imposed by a foreign law if to do so would be contrary to English public policy². Thus it will not recognise an incapacity to marry of a penal character³, or certain types of incapacity to marry of a religious⁴ or racial⁵ character, at any rate if the marriage is celebrated in England⁶. A prohibition on remarriage following a divorce will be recognised if it is an integral part of the divorce proceedings by which alone both parties to the divorce can be released from their incapacity to contract a fresh marriage⁷, but it may be disregarded on the ground of its penal character if it is imposed on the guilty party only⁸.

Similarly, in an exceptional case⁹ the English court will refuse to recognise a capacity to marry given by the law of the domicile if in the circumstances recognition would be unconscionable¹⁰, as perhaps in the case of a marriage that is incestuous by English criminal law¹¹.

The court's discretion to refuse to recognise a foreign capacity or incapacity to marry on the ground of public policy is one to be most sparingly exercised¹².

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See the cases cited in notes 3-5 infra; and see *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85 at 98-99, [1962] 3 All ER 873 at 882-883. See also para 31 ante.

3 *Scott v A-G* (1886) 11 PD 128, as explained in *Warter v Warter* (1890) 15 PD 152.

4 *Sottomayer v De Barros (No 2)* (1879) 5 PD 94 at 104 (incapacity under law of domicile of priest or monk); *Chetti v Chetti* [1909] P 67 (incapacity under Hindu caste rule); *Papadopoulos v Papadopoulos* [1930] P 55 (incapacity to marry otherwise than in accordance with rules of Greek Church); *Gray (otherwise Formosa) v Formosa* [1963] P 259, [1962] 3 All ER 419, CA (incapacity to marry otherwise than in Roman Catholic church; Maltese nullity decree based on this ground not recognised) followed in *Lepre v Lepre* [1965] P 52, [1963] 2 All ER 49; *Re Meyer* [1971] P 298 at 309, [1971] 1 All ER 378 at 386-387.

5 *Sottomayer v De Barros (No 2)* (1879) 5 PD 94 at 104 (colour bar).

6 Although such a limitation is consistent with the decided cases, on principle it should be unnecessary: see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 687.

7 *Warter v Warter* (1890) 15 PD 152 (followed in *Le Mesurier (otherwise Gordon) v Le Mesurier* (1930) 46 TLR 203, 142 LT 496; distinguished in *Buckle v Buckle (otherwise Williams)* [1956] P 181, [1955] 3 All ER 641 (on the ground that the prohibition on remarriage within six months of decree absolute under the Indian Divorce Act 1869 s 57 did not apply where jurisdiction was taken by virtue of the Indian and Colonial Divorce Jurisdiction Acts 1926 and 1940 (both repealed))). See para 230 ante.

8 *Scott v A-G* (1886) 11 PD 128, as explained in *Warter v Warter* (1890) 15 PD 152. In *R v Brentwood Superintendent Registrar of Marriages, ex p Arias* [1968] 2 QB 956 at 968-969, [1968] 3 All ER 279 at 282-283, DC, the court refused to disregard such an incapacity imposed by the law of a foreign country, on the ground that both parties to the proposed remarriage were, and intended to remain, domiciled there.

9 The circumstances would have to be extreme: see paras 30-31 ante.

10 *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85 at 98, [1962] 3 All ER 873 at 882. See also the cases cited in note 11 infra.

11 *Brook v Brook* (1861) 9 HL Cas 193 at 227-228; *Re Bozzelli's Settlement, Husey-Hunt v Bozzelli* [1902] 1 Ch 751 at 754-757; *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85 at 97, [1962] 3 All ER 873 at 882. Cf *Alhaji Mohamed v Knott* [1969] 1 QB 1 at 16-17, [1968] 2 All ER 563 at 568, DC.

12 *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85 at 98-99, [1962] 3 All ER 873 at 882-883; *R v Brentwood Superintendent Registrar of Marriages, ex p Arias* [1968] 2 QB 956 at 968-969, [1968] 3 All ER 279 at 282-283, DC; *Qureshi v Qureshi* [1972] Fam 173 at 201, [1971] 1 All ER 325 at 346. See paras 30-31 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(ii) Capacity to Marry/B. CONSENT OF PARTIES/232. Law governing consent of parties.

B. CONSENT OF PARTIES

232. Law governing consent of parties.

The consent of the parties is a matter of the essential validity of a marriage¹. Generally², a marriage is invalid if it is invalid under the law of either party's antenuptial domicile on the ground of that party's lack of consent³. It is, possibly, also invalid if it is invalid under the *lex loci celebrationis* on the ground of either party's lack of consent⁴. Otherwise the marriage is probably valid in England so far as its validity relies upon the parties' consent, unless and until it is annulled by the English court on the ground of lack of consent under English domestic law⁵.

¹ *Szechter (otherwise Karsov) v Szechter* [1971] P 286 at 294-295, [1970] 3 All ER 905 at 912; cf *Apt v Apt* [1948] P 83 at 88, [1947] 2 All ER 677 at 679, CA.

² The general rule is subject to certain exceptions: see para 227 note 3 ante.

³ *Way v Way*, *Rowley v Rowley*, *Kenward v Kenward*, *Whitehead v Whitehead* [1950] P 71 at 78-79, [1949] 2 All ER 959 at 963 (on appeal sub nom *Kenward v Kenward* [1951] P 124 at 133, [1950] 2 All ER 297 at 302, CA); *Szechter (otherwise Karsov) v Szechter* [1971] P 286 at 294-295, [1970] 3 All ER 905 at 912. In both of these cases the law of the domicile coincided with that of the place where the marriage was celebrated. In respect of a marriage celebrated in England between a party domiciled in England and a party domiciled elsewhere see *Vervaeke v Smith* [1981] Fam 77, [1981] 1 All ER 55, Family Division and CA; *affd*, but not on this point, [1983] 1 AC 145, [1982] 2 All ER 144, HL. See also Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 690. Cf Dicey and Morris *The Conflict of Laws* (9th Edn, 1967) p 271, cited in *Szechter (otherwise Karsov) v Szechter* supra at 294. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

⁴ See para 227 ante. See also *Parojcic (otherwise Ivetic) v Parojcic* [1959] 1 All ER 1 at 4, [1958] 1 WLR 1280 at 1283; cf *Cooper v Crane* [1891] P 369; *Valier v Valier (otherwise Davis)* (1925) 133 LT 830; *Hussein (otherwise Blitz) v Hussein* [1938] P 159, [1938] 2 All ER 344. In all of these cases the marriage was celebrated in England. As to the *lex loci celebrationis* see para 208 ante.

⁵ In all of the cases cited in notes 3-4 supra, the law applied was effectively English domestic law. In *Szechter (otherwise Karsov) v Szechter* [1971] P 286 at 295, 298, [1970] 3 All ER 905 at 912, 915, English law was applied cumulatively with the law of the domicile. Cf *Re Meyer* [1971] P 298 at 305-306, [1971] 1 All ER 378 at 383-384. See also *Mehta (otherwise Kohn) v Mehta* [1945] 2 All ER 690; *H v H* [1954] P 258, [1953] 2 All ER 1229; *Silver (otherwise Kraft) v Silver* [1955] 2 All ER 614, [1955] 1 WLR 728; *Kassim (otherwise Widmann) v Kassim (otherwise Hassim) (Carl and Dickson cited)* [1962] P 224, [1962] 3 All ER 426; *Buckland v Buckland (otherwise Camilleri)* [1968] P 296, [1967] 2 All ER 300. Before 1971 there was some doubt as to whether a lack of consent rendered a marriage void or voidable in English domestic law, but the matter is clarified by the Matrimonial Causes Act 1973 s 12(c), which provides that lack of consent, whether in consequence of duress, mistake, unsoundness of mind or otherwise, renders a marriage voidable if it was celebrated after 31 July 1971. That Act does not affect the English conflict rules applicable to this question in so far as they refer to any foreign law: see s 14(1). For the English domestic rules applicable to lack of consent see ss 12(c)-(f), 13 (s 12(d) as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 41 et seq.

UPDATE

232 Law governing consent of parties

NOTE 3--See *Singh v Singh* 2005 SLT 749, OH; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 43.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(ii) Capacity to Marry/C. PHYSICAL CAPACITY/233. Law governing physical capacity of parties.

C. PHYSICAL CAPACITY

233. Law governing physical capacity of parties.

A marriage is invalid if it is invalid under the law of the petitioner's domicile at the date of the marriage on the ground of either party's incapacity or wilful refusal to consummate the marriage¹. Otherwise it is probably valid in England so far as this aspect of validity is concerned unless and until it is annulled by the English court on one or other of these grounds under English domestic law².

1 *De Reneville v De Reneville* [1948] P 100, [1948] 1 All ER 56, CA (a decision on the jurisdiction of the English court to grant a nullity decree). Cf *Ponticelli v Ponticelli (otherwise Giglio)* [1958] P 204, [1958] 1 All ER 357.

2 *Easterbrook v Easterbrook* [1944] P 10, [1944] 1 All ER 90; *Hutter v Hutter* [1944] P 95, [1944] 2 All ER 368; *Ross Smith v Ross Smith (otherwise Radford)* [1963] AC 280 at 306, 313, 322, [1962] 1 All ER 344 at 356, 361, 367, HL (suggesting that, had the court in that case taken jurisdiction over the voidable marriage, it would have applied the English grounds of nullity regardless of whether they existed under the law of the husband's domicile); *Magnier v Magnier* (1968) 112 Sol Jo 233. Contrast *Robert (otherwise De La Mare) v Robert* [1947] P 164 at 167-168, [1947] 2 All ER 22 at 24; *Addison (otherwise McAllister) v Addison* [1955] NI 1 at 30 (both cases favouring application of the lex loci celebrationis (see para 208 ante); overruled on the question of jurisdiction in *De Reneville v De Reneville* [1948] P 100 at 118, [1948] 1 All ER 56 at 63, CA); and *Ross Smith v Ross Smith (otherwise Radford)* supra at 306, 312, 348, and 356, 369, 384; *Ponticelli v Ponticelli (otherwise Giglio)* [1958] P 204 at 211-216, [1958] 1 All ER 357 at 360-363 (following *Way v Way*, *Rowley v Rowley*, *Kenward v Kenward*, *Whitehead v Whitehead* [1950] P 71 at 80, [1949] 2 All ER 959 at 964, and not following *Robert (otherwise De La Mare) v Robert* supra, favouring application of the law of the husband's domicile). In all of these cases there was no difference between the law which was applied and English law. As to the English domestic rules applicable to incapacity and wilful refusal to consummate a marriage see the Matrimonial Causes Act 1973 ss 12(a), (b), 13(1); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 336 et seq. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(iii) Polygamous Marriages/234. Distinction between monogamous and polygamous marriage.

(iii) Polygamous Marriages

234. Distinction between monogamous and polygamous marriage.

The essential requirement of a monogamous marriage is that it must be the voluntary union for life of one man and one woman to the exclusion of all others¹. A marriage is monogamous if it complies with this requirement, even though it can be dissolved by mutual consent or at the will of either party with merely formal conditions of official registration². A marriage is polygamous if it is celebrated under a law³ which permits the husband⁴, during the subsistence of the marriage, without any change in his personal law⁵, to take more than one wife, or to take concubines if concubinage has a recognised status under that law⁶, whether or not he actually does so⁷.

1 *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130 at 133; *Re Bethell, Bethell v Hildyard* (1888) 38 ChD 220 at 234; *Brinkley v A-G* (1890) 15 PD 76 at 79-80; *R v Hammersmith Superintendent Registrar of Marriages, ex p Mir-Anwaruddin* [1917] 1 KB 634 at 657, 660, CA; *Nachimson v Nachimson* [1930] P 217 at 224, 227-228, 237-238, CA.

2 *Nachimson v Nachimson* [1930] P 217, CA.

3 See para 235 post.

4 A marriage in which the wife is allowed to have more than one husband (a polyandrous as opposed to a polygynous marriage) is also a polygamous marriage for this purpose.

5 I.e. the law governing personal status. This is determined by the law of the domicile. Where this refers the matter of personal status to the religious law of the person concerned, his personal law will depend upon his religion. For the effect of a change in the husband's personal law see para 237 post.

6 *Lee v Lau* [1967] P 14, [1964] 2 All ER 248. Cf *Re Bethell, Bethell v Hildyard* (1888) 38 ChD 220.

7 *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130. The marriage is potentially polygamous until the husband has exercised his right to take more than one wife or to take further concubines; thereafter it is actually polygamous. Cf *Hussain v Hussain* [1983] Fam 26, [1982] 3 All ER 369, CA (see para 235 post). Note that, in relation to the question of the validity of a marriage, a marriage is void for polygamy where one of the parties is domiciled in England, but a potentially polygamous marriage is not polygamous for this purpose: see the Matrimonial Causes Act 1973 s 11 (as amended); and para 238 post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(iii) Polygamous Marriages/235. Determination of nature of marriage.

235. Determination of nature of marriage.

Whether a marriage is monogamous or polygamous in character depends upon the nature and incidents of the marriage according to the *lex loci celebrationis*¹. Thus a marriage is monogamous if celebrated in monogamous form in England² or elsewhere³. Subject to two exceptions, a marriage is polygamous if it is celebrated in polygamous form in a country permitting polygamy⁴. The first exception is that if neither party to a marriage has capacity under his or her personal law⁵ to marry a second spouse, the marriage will be treated, at least for some purposes, as monogamous even though celebrated in polygamous form in a country permitting polygamy⁶. The second exception is that, as regards the question of the validity of a marriage where one of the parties is domiciled in England, it is not polygamous if at the time neither party was actually already married⁷.

1 *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85 at 90, [1962] 3 All ER 873 at 877; *Lee v Lau* [1967] P 14 at 20, [1964] 2 All ER 248 at 252. See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 695-696. As to the *lex loci celebrationis* see para 208 ante. Once the nature and incidents of the union have been ascertained according to local law, the monogamous or polygamous character of the marriage is a question of English law: *Lee v Lau* supra. For the effect of a change in the husband's personal law see para 237 post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Chetti v Chetti* [1909] P 67; *R v Hammersmith Superintendent Registrar of Marriages, ex p Mir-Anwaruddin* [1917] 1 KB 634, CA; *Hussein (otherwise Blitz) v Hussein* [1938] P 159, [1938] 2 All ER 344; *Srini Vasan (otherwise Clayton) v Srini Vasan* [1946] P 67, [1945] 2 All ER 21; *Baindail (otherwise Lawson) v Baindail* [1946] P 122, [1946] 1 All ER 342, CA; *Maher v Maher* [1951] P 342, [1951] 2 All ER 37; *Ohochuku v Ohochuku* [1960] 1 All ER 253, [1960] 1 WLR 183; *Russ (otherwise Geffers) v Russ (Russ otherwise De Waele intervening)* [1964] P 315, [1962] 3 All ER 193, CA; *Qureshi v Qureshi* [1972] Fam 173, [1971] 1 All ER 325; *Singh v Singh* [1971] P 226, [1971] 2 All ER 828, CA; *Hashmi v Hashmi* [1972] Fam 36, [1971] 3 All ER 1253.

3 *Brinkley v A-G* (1890) 15 PD 76 (Japanese marriage); *Spivack v Spivack* (1930) 142 LT 492, DC (Jewish marriage in Poland); *Penhas v Tan Soo Eng* [1953] AC 304, [1953] 2 WLR 459, PC (composite marriage ceremony in Singapore).

4 *Re Bethell, Bethell v Hildyard* (1888) 38 ChD 220 (husband domiciled in England); *Risk (otherwise Yerburch) v Risk* [1951] P 50, [1950] 2 All ER 973 (wife domiciled in England); *Ohochuku v Ohochuku* [1960] 1 All ER 253, [1960] 1 WLR 183 (Nigerian marriage); *Sowa v Sowa* [1961] P 79, [1961] 1 All ER 687, CA.

5 As to personal law see para 234 note 5 ante.

6 *Hussain v Hussain* [1983] Fam 26, [1982] 3 All ER 369, CA, where for the purposes of the Matrimonial Causes Act 1973 s 11(d) (see para 238 note 6 post) a marriage celebrated in polygamous form in Pakistan was not polygamous because the right to take a second spouse did not extend to the wife and, in the case of the husband, he was domiciled in England and therefore unable, by his personal law, to take a further spouse (see s 11(b)). See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 696.

7 See the Matrimonial Causes Act 1973 s 11 (as amended); and paras 238 text and note 6, 240 post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(iii) Polygamous Marriages/236. Marriages celebrated in England.

236. Marriages celebrated in England.

A marriage celebrated in England¹ in accordance with the provisions of the Marriage Act 1949², whether in a register office³ or in a registered building⁴ or in approved premises⁵ or otherwise⁶, is monogamous, wherever the parties may be domiciled⁷. A marriage celebrated in England in polygamous form without a preceding civil ceremony⁸ is a nullity⁹.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 As to the provisions of the Marriage Act 1949 see MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

3 As to marriages in register offices and other places see *ibid* s 45 (as amended), s 45A (as added and amended), s 46 (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 102.

4 As to marriages in registered buildings see *ibid* ss 41-44 (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 104 et seq, 186 et seq. See also the Sharing of Church Buildings Act 1969 s 6, Sch 1 (as amended); and ECCLESIASTICAL LAW; MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 108.

5 As to marriages in approved premises see the Marriage Act 1949 ss 46A, 46B (both as added and amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 111, 190 et seq.

6 See eg *ibid* s 26(i)(dd) (as added); the Marriage (Registrar General's Licence) Act 1970 s 9; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 166.

7 See the cases cited in para 235 note 4 ante.

8 A marriage solemnised in the presence of a superintendent registrar may lawfully be followed by a religious ceremony: Marriage Act 1949 s 46(1) (amended by the Marriage Act 1983 s 1(7), Sch 1 para 12). See also the Marriage (Registrar General's Licence) Act 1970 s 11(1); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 167. However, such a religious ceremony does not supersede or invalidate the civil ceremony and is not to be registered as a marriage: Marriage Act 1949 s 46(2) (amended by the Marriage Act 1983 Sch 1 para 12); applied by the Marriage (Registrar General's Licence) Act 1970 s 11(2).

9 *R v Bham* [1966] 1 QB 159, [1965] 3 All ER 124, CCA; *Qureshi v Qureshi* [1972] Fam 173 at 186, [1971] 1 All ER 325 at 333; *A-M v A-M (Divorce: Jurisdiction: Validity Of Marriage)* [2001] 2 FLR 6. This follows from the principle *locus regit actum* (the place governs the act): see para 208 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(iii) Polygamous Marriages/237. Change in character of marriage.

237. Change in character of marriage.

In determining the monogamous or polygamous character of a marriage, the possibility of a change of personal law¹ by the husband² and the possibility of a change in the substantive rules of the husband's personal law are disregarded unless and until they materialise³. When they do materialise, they may have a decisive effect upon the character of the marriage. Thus a potentially polygamous marriage may be converted into a monogamous marriage by reason of subsequent events, as where the husband changes his religion to a monogamous religion⁴, or his domicile to a country whose law prohibits polygamy⁵, or where the *lex loci celebrationis* prohibits polygamy as a result of subsequent legislation⁶, or prohibits it after the birth of a child⁷, or where the parties subsequently go through a monogamous marriage ceremony⁸. It is uncertain whether a monogamous marriage can be converted into a potentially polygamous one by subsequent events⁹.

1 As to personal law see para 234 note 5 ante.

2 See para 234 note 4 ante.

3 'After all, there are no marriages which are not potentially polygamous, in the sense that they may be rendered so by a change of domicile and religion on the part of the spouses': *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85 at 90, [1962] 3 All ER 873 at 877 per Sir Jocelyn Simon P (approved in *A-G of Ceylon v Reid* [1965] AC 720 at 734, [1965] 1 All ER 812 at 817, PC); *Parkasho v Singh* [1968] P 233 at 244, [1967] 1 All ER 737 at 743, DC. See also *Mehta (otherwise Kohn) v Mehta* [1945] 2 All ER 690.

4 *Sinha Peerage Claim* [1946] 1 All ER 348n, 171 Lords Journals 350 (Committee of Privileges) (as explained in *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85 at 90-91, [1962] 3 All ER 873 at 877-878; and in *Parkasho v Singh* [1968] P 233 at 243, 253, [1967] 1 All ER 737 at 742, 748, DC).

5 *Ali v Ali* [1968] P 564, [1966] 1 All ER 664; *Mirza v Mirza* (1966) 110 Sol Jo 708.

6 *Parkasho v Singh* [1968] P 233, [1967] 1 All ER 737, DC. Cf *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85 at 89, [1962] 3 All ER 873 at 876-877. As to the *lex loci celebrationis* see para 208 ante.

7 *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85, [1962] 3 All ER 873.

8 *Ohochuku v Ohochuku* [1960] 1 All ER 253, [1960] 1 WLR 183; cf *Sowa v Sowa* [1961] P 70 at 82-83, [1961] 1 All ER 687 at 688, CA; *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85 at 89, [1962] 3 All ER 873 at 876.

9 See *Cheni (otherwise Rodriguez) v Cheni* [1965] P 85 at 90, [1962] 3 All ER 873 at 877; *A-G of Ceylon v Reid* [1965] AC 720, [1965] 1 All ER 812, PC. Cf *Mehta (otherwise Kohn) v Mehta* [1945] 2 All ER 690. For a discussion of this question see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 699-700.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(iii) Polygamous Marriages/238. Capacity to contract polygamous marriage.

238. Capacity to contract polygamous marriage.

Capacity to contract a polygamous marriage is governed by the law of each party's antenuptial domicile¹. It has been held that the matter is governed by the law of the country of the parties' intended matrimonial residence², and it may be that capacity under that law would be accepted as an alternative to capacity under the law of the domicile³. Subject to that possibility, a person whose personal law⁴ does not permit polygamy has no capacity to contract an actually polygamous marriage⁵, and a polygamous marriage is void if entered into outside England if at the time of the marriage either party is domiciled in England⁶.

1 *Hussain v Hussain* [1983] Fam 26, [1982] 3 All ER 369, CA. See also *Re Ullee, Nawab Nazim of Bengal's Infants* (1885) 53 LT 711 at 712; *Re Bethell, Bethell v Hildyard* (1888) 38 ChD 220; *Risk (otherwise Yerburch) v Risk* [1951] P 50, [1950] 2 All ER 973; *Ali v Ali* [1968] P 564, [1966] 1 All ER 664; *Mirza v Mirza* (1966) 110 Sol Jo 708; *Crowe v Kader* [1968] WAR 122 (potentially polygamous marriage in Penang between Muslim domiciled in Malaysia and woman domiciled in Australia held to be void). As to legal capacity see para 227 ante.

2 *Radwan v Radwan (No 2)* [1973] Fam 35, [1972] 3 All ER 1026; cf *Kenward v Kenward* [1951] P 124 at 145, [1950] 2 All ER 297 at 310, CA.

3 See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 703-704.

4 As to personal law see para 234 note 5 ante.

5 See the cases cited in note 1 supra.

6 Matrimonial Causes Act 1973 s 11(d), which applies to marriages celebrated after 31 July 1971. For the purposes of s 11(d) a marriage is not polygamous if at its inception neither party has any spouse additional to the other: s 11 (amended by the Private International Law (Miscellaneous Provisions) Act 1995 s 8(2), Schedule para 2(1), (2)). As to when a marriage will be regarded as polygamous see *Hussain v Hussain* [1983] Fam 26, [1982] 3 All ER 369, CA; and para 235 ante. See also the other cases cited in note 1 supra. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(iii) Polygamous Marriages/239. Recognition of polygamous marriages.

239. Recognition of polygamous marriages.

A polygamous marriage which is valid under the *lex loci celebrationis* as regards form¹, and under the law of each party's antenuptial domicile as regards capacity², will be recognised in England³ as a valid marriage unless there is some strong reason to the contrary⁴. During its subsistence the marriage will be held to constitute a bar to a subsequent marriage in England⁵ or, probably, to a subsequent monogamous marriage elsewhere⁶, and effect will be given to the legal consequences flowing from the marriage, such as the legitimacy of the children⁷ and rights of succession to property⁸. The fact that the marriage was celebrated under a law permitting polygamy⁹ does not preclude the English court from granting matrimonial relief or making a declaration concerning the validity of the marriage¹⁰.

For the purpose of social security legislation, a polygamous marriage is to be treated as having the same consequences as a monogamous marriage for any day throughout which it is in fact monogamous¹¹.

1 See paras 208-209, 236 ante. As to the *lex loci celebrationis* see para 208 ante.

2 See para 238 ante.

3 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) Ch 17 Rule 74; and at p 707 (approved under the number given in earlier editions of the work in *Shahnaz v Rizwan* [1965] 1 QB 390 at 397, [1964] 2 All ER 993 at 995; *Alhaji Mohamed v Knott* [1969] 1 QB 1 at 13-14, [1968] 2 All ER 563 at 566-567, DC). There are now very few exceptions to the recognition for all purposes of a valid polygamous marriage; and a potentially polygamous marriage (ie a marriage in polygamous form but actually monogamous) is treated similarly.

5 *Srini Vasan (otherwise Clayton) v Srini Vasan* [1946] P 67, [1945] 2 All ER 21; *Baindail (otherwise Lawson) v Baindail* [1946] P 122, [1946] 1 All ER 342, CA. On the other hand, a polygamous marriage is apparently not a sufficient first marriage to support an indictment for bigamy: *R v Sarwan Singh* [1962] 3 All ER 612, Quarter Sessions; cf *Harvey v Farnie* (1880) 6 PD 35 at 53, CA; *R v Naguib* [1917] 1 KB 359, CCA; *Baindail (otherwise Lawson) v Baindail* supra at 130 and 347; *A-G of Ceylon v Reid* [1965] AC 720, [1965] 1 All ER 812, PC.

6 *Shahnaz v Rizwan* [1965] 1 QB 390 at 396-397, [1964] 2 All ER 993 at 995.

7 *Sinha Peerage Claim* [1946] 1 All ER 348n, 171 Lords Journals 350 (Committee of Privileges); *Baindail (otherwise Lawson) v Bandail* [1946] P 122 at 128, [1946] 1 All ER 342 at 346, CA; *Lee v Lau* [1967] P 14 at 23, [1964] 2 All ER 248 at 254; cf *Hashmi v Hashmi* [1972] Fam 36, [1971] 3 All ER 1253.

8 *Sinha Peerage Claim* [1946] 1 All ER 348n, 171 Lords Journals 350 [1946] 1 All ER 348n (Committee of Privileges); *Baindail (otherwise Lawson) v Baindail* [1946] P 122 at 127-128, [1946] 1 All ER 342 at 346, CA; *Lee v Lau* [1967] P 14 at 23, [1964] 2 All ER 248 at 254. Cf *Cheang Thye Phin v Tan Ah Loy* [1920] AC 369, PC; *Khoo Hooi Leong v Khoo Hean Kwee* [1926] AC 529, PC; *Khoo Hooi Leong v Khoo Chong Yeok* [1930] AC 346, PC; *Bamgbose v Daniel* [1955] AC 107, [1954] 3 All ER 263, PC; *Coleman v Shang (alias Quartey)* [1961] AC 481, [1961] 2 All ER 406, PC. There is a possible exception to this in the case of the right to succeed as heir to real estate in England: *Sinha Peerage Claim* supra; and see para 342 post. See also *Re Sehota, Surjit Kaur v Gian Kaur* [1978] 3 All ER 385, [1978] 1 WLR 1506 (right to apply under the Inheritance (Provision for Family and Dependents) Act 1975); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 667.

9 Ie a marriage which is potentially or actually polygamous at its inception. A marriage which is monogamous at its inception is treated for the present purpose as always remaining monogamous: see para 237 ante.

10 See para 241 post.

11 See the Social Security Contributions and Benefits Act 1992 ss 121, 147; the Social Security and Family Allowances (Polygamous Marriages) Regulations 1975, SI 1975/561 (which have effect as if made under the Social Security Contributions and Benefits Act 1992 s 121); the Child Benefit (General) Regulations 2003, SI 2003/493, reg 35; and SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 36. Contrast *Imam Din v National Assistance Board* [1967] 2 QB 213, [1967] 1 All ER 750, DC (wife of a polygamous marriage, whether actually or potentially polygamous, may be a 'wife' within the meaning of the National Assistance Act 1948 s 42(1)).

UPDATE

239 Recognition of polygamous marriages

NOTE 11--SI 2003/493 reg 35 now Child Benefit (General) Regulations 2006, SI 2006/223, reg 35.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(1) MARRIAGE/(iii) Polygamous Marriages/240. Monogamous marriage celebrated under law permitting polygamy.

240. Monogamous marriage celebrated under law permitting polygamy.

A marriage entered into outside England¹ on or after 8 January 1996² between parties neither of whom is already married, is not void under English law on the ground that it is entered into under a law which permits polygamy and that either party is domiciled in England³. This is deemed also to apply to any marriage entered into before that date⁴, except:

201 (1) a marriage a party to which has (before that date) entered into a later marriage which:

15

22. (a) is valid apart from this provision⁵ but would be void if the provision described above⁶ applied to the earlier marriage⁷, or

23. (b) is valid by virtue of this provision⁸; and

16

202 (2) a marriage which has been annulled⁹ before that date, whether by a decree granted in England or by an annulment obtained elsewhere and recognised in England at that date¹⁰.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 Ie the date on which the Private International Law (Miscellaneous Provisions) Act 1995 Pt II (ss 5-8) came into force: s 16(2). Nothing in Pt II affects any law or custom relating to the marriage of members of the Royal Family: s 8(1).

3 Ibid s 5(1). This does not, however, affect the determination of the validity of a marriage by reference to the law of another country to the extent that it falls to be so determined in accordance with the rules of private international law: s 5(2).

4 Ibid s 6(1). However, nothing in s 5 in its application to marriages entered into before 8 January 1996:

82 (1) gives or affects any entitlement to an interest under the will or codicil of, or on the intestacy of, a person who died before that date, or under a settlement or other disposition of property made before that time (otherwise than by will or codicil) (s 6(6)(a));

83 (2) gives or affects any entitlement to a benefit, allowance, pension or other payment payable before or in respect of a period before that date, or payable in respect of the death of a person before that date (s 6(6)(b));

84 (3) affects tax in respect of a period or event before that date (s 6(6)(c)); or

85 (4) affects the succession to any dignity or title of honour (s 6(6)(d)).

5 Ie valid apart from ibid s 6.

6 Ie ibid s 5: see the text and notes 1-3 supra.

7 Ibid s 6(2)(a).

8 Ie by virtue of ibid s 6: s 6(2)(b).

9 A marriage which has been declared invalid by a court of competent jurisdiction in any proceedings concerning either the validity of the marriage or any right dependent on its validity, is treated for this purpose as having been annulled: ibid s 6(5).

10 Ibid s 6(3). An annulment resulting from legal proceedings begun before 8 January 1996 must be treated for this purpose as having taken effect before that date: s 6(4). Section 6(5) (see note 9 *supra*) also applies for the purposes of s 6(4).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(i) Introduction/241. Jurisdiction.

(2) MATRIMONIAL CAUSES

(i) Introduction

241. Jurisdiction.

A court in England is not precluded from granting matrimonial relief or making a declaration concerning the validity of a marriage by reason only that either party to the marriage is, or during the subsistence of the marriage has been, married to more than one person¹. 'Matrimonial relief' means²:

- 203 (1) any decree under Part I of the Matrimonial Causes Act 1973³;
- 204 (2) an order for financial provision on the ground of failure to provide reasonable maintenance⁴;
- 205 (3) an order for the alteration of a maintenance agreement⁵;
- 206 (4) ancillary relief⁶;
- 207 (5) an order under Part III of the Matrimonial and Family Proceedings Act 1984⁷; and
- 208 (6) an order under Part I of the Domestic Proceedings and Magistrates' Courts Act 1978⁸.

A 'declaration concerning the validity of a marriage' means any declaration under Part III of the Family Law Act 1986⁹ involving a determination as to the validity of a marriage¹⁰.

This does not mean that one wife of a valid polygamous marriage can obtain a divorce on the ground that the husband has committed adultery with another wife¹¹. Nor does it mean that the second wife could obtain a decree of nullity on the ground of bigamy, for if each marriage was validly celebrated in polygamous form under a law permitting polygamy, and if the parties to each marriage had capacity to contract such a marriage by the law of their antenuptial domicile¹², the second marriage cannot be void for bigamy¹³. In the case of divorce petitions based on behaviour or desertion, the background of the parties¹⁴ will be taken into account, and entry into a second marriage may be relevant to that extent¹⁵.

On the other hand, if a Muslim domiciled in India marries a woman domiciled there in polygamous form in India, and subsequently goes through a ceremony with another woman in England¹⁶, or subsequently acquires an English domicile and goes through a ceremony with another woman in India or elsewhere¹⁷, the second wife could obtain a decree of nullity on the ground of bigamy.

1 Matrimonial Causes Act 1973 s 47(1) (amended by the Private International Law (Miscellaneous Provisions) Act 1995 s 8(2), Schedule para 2(1), (3)(a)). As to the meanings of 'England', 'English' and 'English law' see para 4 ante. The enactment of this provision effectively abolished the rule in *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130. As to the validity and effect of polygamous marriages see the text and note 11 infra; and paras 234-239 ante. Provision may be made by rules of court for requiring notice of proceedings for matrimonial relief to be served on any additional spouse of a party to the marriage in question, and for conferring on any such additional spouse the right to be heard in any proceedings: Matrimonial Causes Act 1973 s 47(4) (substituted by the Private International Law (Miscellaneous Provisions) Act 1995 Schedule para 2(3)(b)). As to the provisions that have been made see the Family Proceedings Rules 1991, SI 1991/1247, r 3.11 (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 1010).

2 Matrimonial Causes Act 1973 s 47(2) (amended by the Domestic Proceedings and Magistrates' Courts Act 1978 s 89, Sch 2 para 39; and by the Matrimonial and Family Proceedings Act 1984 s 46(1), Sch 1 para 15). The Matrimonial Causes Act 1973 s 47(2) has been prospectively amended by the Family Law Act 1996 s 66(1), Sch 8 Pt I para 22. At the date at which this volume states the law no day had been appointed for the commencement of the amending provisions. The Lord Chancellor has announced that the Family Law Act 1996 Pt II (ss 2-25) will not be implemented and the relevant provisions of that Act (which include the amendments effected by s 66, Sch 8 Pt I para 22) will be repealed without being brought into force: see 620 HL Official Report (5th series), 16 January 2001, written answers col 126.

3 Matrimonial Causes Act 1973 s 47(2)(a). The decree referred to in the text is any decree under Pt I (ss 1-20) (as amended), namely, a decree of divorce, judicial separation, nullity of marriage, or presumption of death and dissolution of marriage (see paras 243, 261 post).

4 Ibid s 47(2)(b). The order referred to in the text is an order under s 27 (as amended) (see para 284 post).

5 Ibid s 47(2)(c). The order referred to in the text is an order under s 35 (as amended) (see para 290 post).

6 Ibid s 47(2)(d). The order referred to in the text is any order under any provision of the Matrimonial Causes Act 1973 which confers a power exercisable in connection with, or in with connection with proceedings for, any decree or order mentioned in heads (1)-(3) in the text.

7 Ie an order under the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) (as amended), namely an order for financial relief for the parties to the marriage and the children of the family (see para 284 post) or an order relating to children (see para 266 et seq post): Matrimonial Causes Act 1973 s 47(2)(dd) (added by the Matrimonial and Family Proceedings Act 1984 s 46(1), Sch 1 para 15).

8 Ie an order under the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35) (as amended) (certain orders relating to financial relief and protection of parties) (see para 285 post): Matrimonial Causes Act 1973 s 47(2)(e) (amended by the Domestic Proceedings and Magistrates' Courts Act 1978 s 89(2)(a), Sch 2 para 39).

9 Ie the Family Law Act 1986 Pt III (ss 55-67) (as amended).

10 Matrimonial Causes Act 1973 s 47(3) (substituted by the Family Law Act 1986 s 68, Sch 1 para 14).

11 See *Report on Polygamous Marriages* (Law Com no 42) (1971) para 50; *Onobrauche v Onobrauche* (1978) 8 Fam Law 107. Although the Matrimonial Causes Act 1973 s 1(2)(a) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 347, 350) allows a court to hold that a marriage has broken down irretrievably if the petitioner satisfies the court that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent, both marriages in the case of a valid polygamous marriage are valid and it is impossible to commit adultery with one's own spouse.

12 See paras 238-239 ante.

13 See the Matrimonial Causes Act 1973 s 11(b), which provides that a marriage is void if at the time of the marriage either party was already lawfully married and which, therefore, could hardly apply to such a case (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 326).

14 This includes Muslim law if it governed the inception of the marriage: *Quoraishi v Quoraishi* [1985] FLR 780, CA.

15 *Quoraishi v Quoraishi* [1985] FLR 780, CA.

16 *Baindail (otherwise Lawson) v Baindail* [1946] P 122, [1946] 1 All ER 342, CA.

17 See the Matrimonial Causes Act 1973 s 11(d); and para 238 ante.

UPDATE

241 Jurisdiction

NOTE 13--Matrimonial Causes Act 1973 s 11(b) amended: Civil Partnership Act 2004 Sch 27 para 40.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/A. JURISDICTION OF THE COURT/242. Jurisdiction under the 'Brussels II' Regulation.

(ii) Divorce, Legal Separation and Marriage Annulment

A. JURISDICTION OF THE COURT

242. Jurisdiction under the 'Brussels II' Regulation.

In civil proceedings relating to divorce, legal separation or marriage annulment¹ and to parental responsibility for the children of both spouses on issues that are closely linked to proceedings for divorce, legal separation or marriage annulment², the jurisdiction of an English court³ is determined by the 'Brussels II' Regulation⁴.

Under the Regulation, jurisdiction lies with the English courts if, and only if:

- 209 (1) the spouses are habitually resident⁵ in England⁶; or
- 210 (2) the spouses were last habitually resident in England, and one of them still resides there⁷; or
- 211 (3) the respondent is habitually resident in England⁸; or
- 212 (4) (in the event of a joint application) either of the spouses is habitually resident in England⁹; or
- 213 (5) the applicant is habitually resident in England and has resided there for at least a year immediately before the application was made¹⁰; or
- 214 (6) the applicant is habitually resident in England and has resided there for at least six months immediately before the application was made and has his domicile¹¹ there¹²; or
- 215 (7) both spouses are domiciled in England¹³.

If proceedings are pending for divorce, legal separation or marriage annulment before the English court, then the English court also has jurisdiction to examine a counterclaim, in so far as the latter comes within the scope of the relevant provisions of the Regulation¹⁴. In urgent cases, the provisions of the Regulation do not prevent an English court from taking such provisional, including protective, measures in respect of persons or assets in England as may be available under English law, even if, under the Regulation, the court of another member state has jurisdiction as to the substance of the matter¹⁵. Otherwise, under the Regulation, where an English court is seised of a case over which it has no jurisdiction and over which a court of another member state has jurisdiction by virtue of the Regulation, it must declare of its own motion that it has no jurisdiction¹⁶.

1 'Brussels II' Regulation art 1 para 1(a). See note 4 infra. Other proceedings officially recognised in a member state of the European Union are regarded as equivalent to judicial proceedings: art 1 para 2.

The Regulation does not affect issues such as the fault of the spouses, property consequences of the marriage, the maintenance obligation or any other ancillary measures: Recital 10. However, the property consequences of marriage and maintenance obligations are subject to further regulation within the European Union and it is likely that the Regulation will be supplemented or replaced: see para 65 note 1 ante. At the date at which this volume states the law there were proposals pending which will extend the scope of the Regulation in relation to matters of parental responsibility: see para 265 note 2 post.

As to nullity of marriage, divorce and judicial separation in English law generally see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 319 et seq, 346 et seq. The term 'legal separation', used in the Regulation, is used in English law to refer to overseas decrees (see the Family Law Act 1986 ss 45-49; and paras 254-257

post) while the term 'judicial separation' is used to refer to domestic decrees (see the Family Law Act 1986 s 44; and para 253 post). The Family Law Act 1986 ss 51-52 use both terms, each in its appropriate context. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 'Brussels II' Regulation art 1 para 1(b). See note 4 infra. The term 'parental responsibility' is not defined in the Regulation. Because the scope of the Regulation is limited to 'children of both spouses', children whose relationship to their parents does not depend upon that marriage (eg stepchildren, adopted children or the children of unmarried parents) are excluded. However, this area is subject to specific proposals for revision which, if implemented, will expand the scope of regulation within the European Union to include all children in the member states: see para 65 note 1 ante. As to matters of parental responsibility under the Regulation see para 265 et seq post.

3 For these purposes, the term 'court' covers all the authorities (judicial or otherwise) with jurisdiction in matters to which the text and notes 1-2 supra relate: 'Brussels II' Regulation art 1 para 2. See note 4 infra. This ensures that the Regulation covers civil proceedings and non-judicial proceedings in matrimonial matters that are yet equivalent to judicial proceedings (see note 1 supra), but excludes purely religious procedures: Recital 9.

The grounds of jurisdiction accepted in this Regulation are based on the rule that there must be a real link between the party concerned and the member state exercising jurisdiction; the decision to include certain grounds corresponds to the fact that they exist in different national legal systems and are accepted by the other member states: Recital 12.

4 The EC Council Regulation 1347/2000 (OJ L160, 30.6.2000, p 19) on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. References in this title to 'the 'Brussels II' Regulation' are to this Regulation, in accordance with the terminology used within the European Union: see para 65 note 1 ante. The Regulation, which contains rules of jurisdiction as well as rules for the recognition and enforcement of foreign judgments, entered into force on 1 March 2001 (see art 46) among all member states of the European Union with the exception of Denmark (see art 1 para 3). Accordingly, in this title, the term 'member state', used in reference to the 'Brussels II' Regulation, means all member states of the European Union except Denmark.

The legal basis for the Regulation is the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) arts 61, 67 (formerly arts 73i, 73o and renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)*[1999] All ER (EC) 646, ECJ), which provide for measures in the field of judicial co-operation in civil matters having cross-border implications.

5 As to habitual residence see paras 59-61 ante. Note that habitual residence has to be established only in relation to one spouse whereas nationality and domicile must be established in relation to both before jurisdiction can be established: see notes 11-13 infra. With regard to a member state in which two or more systems of law or sets of rules concerning matters governed by the 'Brussels II' Regulation apply in different territorial units, any reference to habitual residence in that member state refers to habitual residence in a territorial unit: 'Brussels II' Regulation art 41(a).

6 'Brussels II' Regulation art 2 para 1(a), first tiret.

7 Ibid art 2 para 1(a), second tiret.

8 Ibid art 2 para 1(a), third tiret.

9 Ibid art 2 para 1(a), fourth tiret.

10 Ibid art 2 para 1(a), fifth tiret.

11 For the purpose of the 'Brussels II' Regulation, 'domicile' has the same meaning as it has under the legal systems of the United Kingdom and Ireland: art 2 para 2. As to domicile see para 35 et seq ante. With regard to a member state in which two or more systems of law or sets of rules concerning matters governed by the Regulation apply in different territorial units, any reference to 'domicile' refers to the territorial unit designated by the law of that state: art 41(b). In the case of member states apart from the United Kingdom and Ireland, nationality is used as a connecting factor rather than domicile: see note 12 infra. For the meaning of 'United Kingdom' see para 4 ante.

12 'Brussels II' Regulation art 2 para 1(a), sixth tiret. In the case of member states apart from the United Kingdom and Ireland, the applicant must be habitually resident in the member state in question and have resided there for at least six months immediately before the application was made and be a national there: art 2 para 1(a), sixth tiret.

13 Ibid art 2 para 1(b). A spouse who: (1) is habitually resident in England; or (2) has his or her domicile in England, may be sued in another member state only in accordance with heads (1)-(7) in the text: art 7. The

context makes it obvious that the 'spouse' referred to must be a respondent in the proceedings. In the case of member states apart from the United Kingdom and Ireland, both spouses must be habitually resident in the member state in question and be nationals there: art 7.

14 le *ibid* arts 2-4: art 5. Without prejudice to these provisions, the court of a member state which has given a judgment on a legal separation also has jurisdiction for converting that judgment into a divorce, if the law of that member state so provides: art 6. As to the 'Brussels II' Regulation arts 3-4 see para 265 post.

15 *Ibid* art 12. See *A v L (Jurisdiction: Brussels II)*[2002] 1 FLR 1042, [2002] Fam Law 241.

16 'Brussels II' Regulation art 9.

UPDATE

242 Jurisdiction under the 'Brussels II' Regulation

TEXT AND NOTES--EC Council Regulation 1347/2000 replaced: see EC Council Regulation 2201/2003. See also *C v C*[2006] EWHC 3247 (Fam), [2006] All ER (D) 278 (Dec); and Case C-68/07 *Sundelind Lopez v Lopez Lizazo* [2008] 3 WLR 338, [2007] All ER (D) 468 (Nov), ECJ.

NOTE 4--See *Re G (children) (foreign contact order: enforcement)*[2003] EWCA Civ 1607, [2004] 1 FCR 266.

NOTE 12--See *Marinos v Marinos*[2007] EWHC 2047 (Fam), [2007] 2 FLR 1018 (applicant habitually resident in United Kingdom and resided there six months prior to petition for divorce).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/A. JURISDICTION OF THE COURT/243. Residual jurisdiction of the court.

243. Residual jurisdiction of the court.

If none of the circumstances covered by the 'Brussels II' Regulation applies¹, the English court may exercise residual jurisdiction over proceedings that have been commenced on or after 1 March 2001 if (and only if) no court of a contracting state² has jurisdiction under the Regulation³ and:

- 216 (1) in relation to divorce or judicial separation proceedings, either of the parties to the marriage is domiciled in England on the date when the proceedings are begun⁴; or
- 217 (2) in relation to proceedings for nullity of marriage, either of the parties to the marriage is domiciled in England on the date when the proceedings are begun or had died before that date and either was at death domiciled in England or had been habitually resident in England throughout the period of one year ending with the date of death⁵.

At any time when proceedings are pending in respect of which an English court has jurisdiction in relation to divorce or judicial separation⁶, or to nullity⁷, the court has jurisdiction also to entertain other proceedings, in respect of the same marriage, for nullity, divorce or judicial separation, notwithstanding that jurisdiction would not otherwise be so exercisable⁸.

The exercise of the English court's residual jurisdiction in proceedings for divorce or judicial separation is subject to rules requiring or enabling the court to stay those proceedings in certain circumstances. These rules are considered elsewhere in this title⁹.

1 See para 242 ante. As to the 'Brussels II' Regulation see para 242 note 4 ante.

2 For these purposes, 'contracting state' means:

86 (1) one of the original parties to the 'Brussels II' Regulation (ie Belgium, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden and the United Kingdom) (Domicile and Matrimonial Proceedings Act 1973 s 5(1A)(a) (s 5(1A) added by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310, reg 3(1), (3)); and

87 (2) a party which has subsequently adopted the 'Brussels II' Regulation (Domicile and Matrimonial Proceedings Act 1973 s 5(1A)(b) (as so added)).

For these purposes, 'court' means the High Court and a divorce county court within the meaning of the Matrimonial and Family Proceedings Act 1984 Pt V (ss 32-44) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 732): Domicile and Matrimonial Proceedings Act 1973 s 5(1A) (as added). For the meaning of 'United Kingdom' see para 4 ante.

3 Ibid s 5(1)(a), (2), (3) (substituted by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310, reg 3(1), (4)). Where no court of a member state has jurisdiction under the provisions of the 'Brussels II' Regulation, jurisdiction is determined, in each member state, by the laws of that state: art 8 para 1. As against a respondent who is not habitually resident and does not have his domicile in England, any national of a member state who is habitually resident within the territory of another member state may, like the nationals of that state, avail himself of the rules of jurisdiction applicable in that state: art 8 para 2. For the meaning of 'member state' see para 242 note 4 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. As from a day to be appointed, the Domicile and Matrimonial Proceedings Act 1973 s 5(1) will be amended by the Family Law Act 1996 s 66(3), Sch 10. However, at the date at which this volume states the law no such day had been appointed.

4 Domicile and Matrimonial Proceedings Act 1973 s 5(1)(a), (2) (as substituted: see note 3 supra). Section 5(2) (as substituted) does not give the court jurisdiction to entertain proceedings in contravention of the 'Brussels II' Regulation art 7: Domicile and Matrimonial Proceedings Act 1973 s 5(3A) (added by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310, reg 3(1), (6)).

Because art 7 of the 'Brussels II' Regulation reserves exclusive jurisdiction in the relevant proceedings for respondents who are domiciled in England (see para 242 text and note 13 ante), the only remaining ground for jurisdiction under the Domicile and Matrimonial Proceedings Act 1973 s 5(2) (as substituted) is reserved for applicants in such proceedings who are domiciled in England (and where the respondent is not habitually resident in a member state nor domiciled in the United Kingdom or Ireland or a national of a member state other than the United Kingdom or Ireland).

5 Ibid s 5(1)(a), (3) (as substituted: see note 3 supra). This ground of jurisdiction is intended to cover the rare case where a person with sufficient interest petitions for a decree that a marriage is void after the death of one or both parties to the marriage. Section 5(3) (as substituted) does not give the court jurisdiction to entertain proceedings in contravention of the 'Brussels II' Regulation art 7: Domicile and Matrimonial Proceedings Act 1973 s 5(3A) (as added: see note 4 supra).

Because art 7 of the 'Brussels II' Regulation reserves exclusive jurisdiction in the relevant proceedings for respondents who are domiciled in England (see para 242 text and note 13 ante), the only remaining ground for jurisdiction under the Domicile and Matrimonial Proceedings Act 1973 s 5(3) (as substituted) is reserved for applicants in such proceedings who are domiciled in England (where the respondent is not habitually resident in a member state nor domiciled in the United Kingdom or Ireland nor a national of a member state other than the United Kingdom or Ireland).

6 Ie by virtue of *ibid* s 5(2) (as substituted: see note 3 supra).

7 Ie by virtue of *ibid* s 5(3) (as substituted: see note 3 supra).

8 Ibid s 5(5). No proceedings were, however, to be entertained by the court by virtue of s 5(5) while proceedings for nullity of marriage, begun before 1 January 1974, were pending, in respect of the same marriage, in Scotland, Northern Ireland, the Channel Islands or the Isle of Man; and provision might be made by rules of court as to when, for these purposes, proceedings were to be treated as begun or pending in any of those places: s 6(3). Nothing in Pt II (ss 5-14) (as amended) affected the court's jurisdiction to entertain any proceedings begun before 1 January 1974: ss 6(4)(b), 17(5). As to stays of proceedings where there are concurrent proceedings elsewhere in respect of the same marriage see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 839 et seq. The Domicile and Matrimonial Proceedings Act 1973 s 5(5) has been prospectively substituted by the Family Law Act 1996 s 66(1), Sch 8 Pt I para 26. At the date at which this volume states the law no day had been appointed for the commencement of the amending provisions. The Lord Chancellor has announced that the Family Law Act 1996 Pt II (ss 2-25) will not be implemented and the relevant provisions of that Act (which include the amendments effected by s 66, Sch 8 Pt I para 26) will be repealed without being brought into force: see 620 HL Official Report (5th series), 16 January 2001, written answers col 126.

9 See paras 247-250 post.

UPDATE

243 Residual jurisdiction of the court

NOTE 2--1973 Act s 5(1A) amended: European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265.

NOTE 4--1973 Act s 5(3A) omitted: SI 2005/265.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/B. CHOICE OF LAW/244. Choice of law.

B. CHOICE OF LAW

244. Choice of law.

Whenever it exercises jurisdiction in divorce or judicial separation, the English court will apply English domestic law¹. The grounds on which a decree may be pronounced are defined by statute, and a petition cannot be presented on any other ground².

In regard to the nullity of marriage, issues as to the formal validity of a marriage are governed by the *lex loci celebrationis*³; issues of legal capacity to marry are governed by the law of each party's antenuptial domicile⁴; issues of alleged want of consent by one party are governed by the law of either party's antenuptial domicile or, possibly, by the *lex loci celebrationis*⁵; and issues of alleged impotence or wilful refusal to consummate are governed by the law of the petitioner's domicile or, possibly, by English domestic law as the *lex fori*⁶. There seems to be no case in which a marriage alleged to be voidable under a foreign law has been annulled by the English court on a ground unknown to English law⁷.

1 This was assumed to be the law in *Zanelli v Zanelli* (1948) 64 TLR 556, 92 Sol Jo 646, CA, and was subsequently confirmed by statute: see the Law Reform (Miscellaneous Provisions) Act 1949 s 1(4) (repealed), successively re-enacted as the Matrimonial Causes Act 1950 s 18(2) (repealed); the Matrimonial Causes Act 1965 s 40(2) (repealed); and the Matrimonial Causes Act 1973 s 46(2) (repealed without replacement by the Domicile and Matrimonial Proceedings Act 1973 s 17(2), Sch 6; but this was not intended to alter the law as stated in the text: see *Report on Jurisdiction in Matrimonial Causes* (Law Com no 48) (1972) paras 103-108). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 As to the ground for divorce see the Matrimonial Causes Act 1973 s 1; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 346 et seq; and as to the ground for judicial separation see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 346.

3 As to the *lex loci celebrationis* see para 208 ante.

4 See para 227 ante.

5 See para 232 ante.

6 See para 233 ante.

7 See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 729-730. Cf *Vervaeke (formerly Messina) v Smith* [1983] 1 AC 145, [1982] 2 All ER 144, HL.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/C. STAYING OF MATRIMONIAL PROCEEDINGS/(A) Under the 'Brussels II' Regulation/245. Mandatory stay of proceedings: examination as to admissibility.

C. STAYING OF MATRIMONIAL PROCEEDINGS

(A) UNDER THE 'BRUSSELS II' REGULATION

245. Mandatory stay of proceedings: examination as to admissibility.

Under the 'Brussels II' Regulation¹, where proceedings are begun in an English court² and the respondent is habitually resident in another member state³ and does not enter an appearance, the court must stay the proceedings so long as it is not shown that the respondent has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end⁴.

1 As to the 'Brussels II' Regulation see para 242 note 4 ante.

2 For the meaning of 'court' see para 242 note 3 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 For the meaning of 'member state' see para 242 note 4 ante.

4 'Brussels II' Regulation art 10 para 1. Where the document instituting the proceedings or an equivalent document has to be transmitted from one member state to another pursuant to the Service Regulation, art 19 of that Regulation displaces the provisions of the 'Brussels II' Regulation art 10 para 1: art 10 para 2. Where the Service Regulation does not apply and a member state is bound to serve judicial and extra-judicial documents in accordance with its international obligations: see the 'Brussels II' Regulation art 10 para 3. For the meaning of 'the Service Regulation' see para 120 note 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/C. STAYING OF MATRIMONIAL PROCEEDINGS/(A) Under the 'Brussels II' Regulation/246. Mandatory stay of proceedings: *lis alibi pendens*.

246. Mandatory stay of proceedings: *lis alibi pendens*.

Where an English court¹ derives its jurisdiction from the 'Brussels II' Regulation² and:

- 218 (1) proceedings involving the same cause of action and between the same parties have been brought before the courts of another member state as well as in England³; or
- 219 (2) proceedings for divorce, legal separation or marriage annulment are brought before the courts of another member state as well as in England involving the same parties but not involving the same cause of action⁴,

then the court second seised (whichever it is) must of its own motion stay its proceedings until such time as the jurisdiction of the court first seised (whichever it is) is established⁵. Where the jurisdiction of the court first seised is established, the court second seised must decline jurisdiction in favour of that court; and the party who brought the relevant action before the court second seised may then bring that action before the court first seised⁶.

1 For the meaning of 'court' see para 242 note 3 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 As to jurisdiction under the 'Brussels II' Regulation see para 242 ante. As to the 'Brussels II' Regulation see para 242 note 4 ante.

3 'Brussels II' Regulation art 11 para 1. See the 'Brussels I' Regulation art 27; and para 128 ante.

4 'Brussels II' Regulation art 11 para 2. These are so-called 'dependent actions' involving the same parties: see the heading to Section 3 (arts 11-12) of the 'Brussels II' Regulation. Cf the 'Brussels I' Regulation art 28; and para 129 ante. For the meaning of 'member state' see para 242 note 4 ante.

5 'Brussels II' Regulation art 11 paras 1, 2. For these purposes, a court is deemed to be seised: (1) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent; or (2) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court: art 11 para 4. See the 'Brussels I' Regulation art 30; and para 128 ante.

6 'Brussels II' Regulation art 11 para 3.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/C. STAYING OF MATRIMONIAL PROCEEDINGS/(B) Under other Statutes/247. Duty to furnish particulars of concurrent proceedings in another jurisdiction.

(B) UNDER OTHER STATUTES

247. Duty to furnish particulars of concurrent proceedings in another jurisdiction.

While matrimonial proceedings¹ are pending in the English court² in respect of a marriage and the trial or first trial³ in those proceedings has not begun, it is the duty of the petitioner, or of a respondent who has in his answer included a prayer for relief, to furnish in such manner and to such persons and on such occasions as may be prescribed⁴, such particulars as may be prescribed⁵ of any proceedings which he knows to be continuing in another jurisdiction⁶ and which are in respect of that marriage or are capable of affecting its validity or subsistence⁷.

1 'Matrimonial proceedings' means proceedings for divorce, judicial separation, nullity of marriage, a declaration as to the validity of the marriage of the petitioner, or a declaration as to the subsistence of such a marriage: Domicile and Matrimonial Proceedings Act 1973 s 5(6), Sch 1 paras 1, 2. See also MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 840. The Domicile and Matrimonial Proceedings Act 1973 s 5(6), Sch 1 para 1 has been prospectively amended by the Family Law Act 1996 s 19(5), Sch 3 para 2; and the Domicile and Matrimonial Proceedings Act 1973 s 5(6), Sch 1 para 2 has been prospectively substituted by the Family Law Act 1996 Sch 3 para 3. At the date at which this volume states the law no day had been appointed for the commencement of the amending provisions. The Lord Chancellor has announced that the Family Law Act 1996 Pt II (ss 2-25) will not be implemented and the relevant provisions of that Act (which include the amendments effected by s 19(5), Sch 3 paras 2, 3) will be repealed without being brought into force: see 620 HL Official Report (5th series), 16 January 2001, written answers col 126.

2 For the meaning of 'court' see para 242 note 3 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 'The trial or first trial' does not include the separate trial of an issue as to jurisdiction only: Domicile and Matrimonial Proceedings Act 1973 Sch 1 paras 1, 4(1). Nor does it include a hearing relating to residence etc of children or ancillary relief: *Thyssen-Bornemisza v Thyssen-Bornemisza* [1986] Fam 1, [1985] 1 All ER 328, CA. The Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 1 has been prospectively amended by the Family Law Act 1996 Sch 3 para 2; but see note 1 supra.

4 'Prescribed' means prescribed by rules of court: Domicile and Matrimonial Proceedings Act 1973 Sch 1 paras 1, 6. As to the rules that have been made see the Family Proceedings Rules 1991, SI 1991/1247, rr 2.3, 2.15(4), App 2 (as amended); and note 5 infra. The Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 1 has been prospectively amended by the Family Law Act 1996 Sch 3 para 2; but see note 1 supra.

5 Unless otherwise directed every petition, other than a petition under the Family Proceedings Rules 1991, SI 1991/1247, r 3.12, r 3.13 (as substituted), r 3.14 or r 3.15 (applications under the Family Law Act 1986 s 55 (as amended), s 56 (as substituted and amended), s 57 (as amended) for declarations as to marital status, parentage, legitimacy or legitimation, or adoption effected overseas), must state whether there are any proceedings continuing in any country outside England which relate to the marriage or are capable of affecting its validity or subsistence, and if so must state:

88 (1) particulars of the proceedings, including the court or tribunal before which they were begun (Family Proceedings Rules 1991, SI 1991/1247, r 2.3, App 2 para 1(j)(i));

89 (2) the date they were begun (r 2.3, App 2 para 1(j)(ii));

90 (3) the names of the parties (r 2.3, App 2 para 1(j)(iii));

91 (4) the date or expected date of any trial in the proceedings (r 2.3, App 2 para 1(j)(iv)); and

- 92 (5) such other facts as may be relevant to the question whether the proceedings on the petition ought to be stayed under the Domicile and Matrimonial Proceedings Act 1973 s 5(6), Sch 1 (as amended) (Family Proceedings Rules 1991, SI 1991/1247, r 2.3, App 2 para 1(j)(v)).

Such proceedings include any which are not instituted in a court of law in that country if they are instituted before a tribunal or other authority having power under the law there to determine questions of status, and must be treated as continuing if they have been begun and not finally disposed of: r 2.3, App 2 para 1(j).

Where an answer to any petition contains a prayer for relief, that answer must contain the required information to the extent that it has not been given by the petitioner: r 2.15(4).

Any party who makes a request for directions for trial must, if there has been a change in the information given under these provisions, file a statement giving particulars of the change: r 2.27(4).

The Domicile and Matrimonial Proceedings Act 1973 s 5(6), Sch 1 has been prospectively amended by the Family Law Act 1996 s 19(5), Sch 3; but see note 1 *supra*.

6 'Another jurisdiction' means any country outside England: Domicile and Matrimonial Proceedings Act 1973 Sch 1 paras 1, 3(1). As to the meanings of 'England', 'English' and 'English law' see para 4 *ante*. Schedule 1 para 1 has been prospectively amended by the Family Law Act 1996 Sch 3 para 2; but see note 1 *supra*.

7 Domicile and Matrimonial Proceedings Act 1973 Sch 1 paras 1, 7. Schedule 1 para 1 has been prospectively amended, and Sch 1 para 7 has been prospectively substituted, by the Family Law Act 1996 Sch 3 paras 2, 5; but see note 1 *supra*.

UPDATE

247 Duty to furnish particulars of concurrent proceedings in another jurisdiction

NOTE 1--See the 1973 Act s 5(6A) (added by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265).

NOTE 5--The court does not lose its jurisdiction if the petitioner fails to furnish the prescribed particulars: *Rogers-Headicar v Headicar* [2004] EWCA Civ 1867, [2005] 2 FCR 1.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/C. STAYING OF MATRIMONIAL PROCEEDINGS/(B) Under other Statutes/248. Obligatory stays.

248. Obligatory stays.

Where, before the beginning of the trial or first trial¹ in any proceedings for divorce² which are continuing in the court³, it appears, on the application of a party to the marriage⁴, that:

- 220 (1) proceedings in respect of the same marriage for divorce or nullity of marriage are continuing in a related jurisdiction⁵; and
- 221 (2) the parties to the marriage have resided together after its celebration⁶; and
- 222 (3) the place where they resided together when the English proceedings were begun, or, if they did not then reside together, where they last resided together before those proceedings were begun, is in that jurisdiction⁷; and
- 223 (4) either of the parties to the marriage was habitually resident⁸ in that jurisdiction throughout the year ending with the date on which they last resided together before the date on which the English proceedings were begun⁹,

the court must order the proceedings before it to be stayed¹⁰.

The stay may be discharged on the application of any party to the proceedings if it appears to the court that the other proceedings by reference to which the stay was ordered are themselves stayed or concluded, or that a party to those other proceedings has delayed unreasonably in prosecuting them¹¹.

Where an obligatory stay, imposed under the above-mentioned duty, is discharged, the court may not, acting under that duty, again stay the proceedings¹².

1 For the meaning of 'the trial or first trial' see para 247 note 3 ante.

2 In the case of proceedings which are not only proceedings for divorce, the duty only applies to the proceedings so far as they are proceedings for divorce: see the Domicile and Matrimonial Proceedings Act 1973 s 5(6), Sch 1 para 8(2). Section 5(6), Sch 1 para 8 has been prospectively amended by the Family Law Act 1996 s 19(5), Sch 3 para 6. At the date at which this volume states the law no day had been appointed for the commencement of the amending provisions. The Lord Chancellor has announced that the Family Law Act 1996 Pt II (ss 2-25) will not be implemented and the relevant provisions of that Act (which include the amendments effected by s 19(5), Sch 3 para 6) will be repealed without being brought into force: see 620 HL Official Report (5th series), 16 January 2001, written answers col 126.

3 Proceedings are continuing in the court if they are pending and not stayed: Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 4(2).

4 An application for a stay under these provisions must be made to the district judge, who may either determine the application or refer it, or any question arising on it, to a judge for his decision as if it were an application for ancillary relief: Family Proceedings Rules 1991, SI 1991/1247, r 2.27(1). For the meaning of 'ancillary relief' see r 1.2(1).

5 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 8(2)(a). 'Related jurisdiction' means any of the following, namely: Scotland, Northern Ireland, Jersey, Guernsey (including Alderney and Sark) and the Isle of Man: Sch 1 paras 1, 3(2). See also MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 841. The Domicile and Matrimonial Proceedings Act 1973 Sch 1 paras 1, 8 have been prospectively amended by the Family Law Act 1996 Sch 3 paras 2, 6; but see note 2 supra.

6 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 8(2)(b). Schedule 1 para 8 has been prospectively amended by the Family Law Act 1996 Sch 3 para 6; but see note 2 supra.

7 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 8(2)(c). As to the meanings of 'England', 'English' and 'English law' see para 4 ante. Schedule 1 para 8 has been prospectively amended by the Family Law Act 1996 Sch 3 para 6; but see note 2 supra.

8 As to habitual residence see paras 59-61 ante.

9 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 8(2)(d). Schedule 1 para 8 has been prospectively amended by the Family Law Act 1996 Sch 3 para 6; but see note 2 supra.

10 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 8(2). Schedule 1 para 8 has been prospectively amended by the Family Law Act 1996 Sch 3 para 6; but see note 2 supra.

11 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 10(1). An application for the discharge of a stay may be made to the district judge, who may either determine the application or refer it, or any question arising on it, to a judge for his decision as if it were an application for ancillary relief: Family Proceedings Rules 1991, SI 1991/1247, r 2.27(5). The Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 10 has been prospectively amended by the Family Law Act 1996 Sch 3 para 8; but see note 2 supra.

12 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 10(2). Schedule 1 para 10 has been prospectively amended by the Family Law Act 1996 Sch 3 para 8; but see note 2 supra.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/C. STAYING OF MATRIMONIAL PROCEEDINGS/(B) Under other Statutes/249. Discretionary stays.

249. Discretionary stays.

Without prejudice to any existing power to stay proceedings¹, where before the beginning of the trial or first trial² in any matrimonial proceedings³ which are continuing in the court⁴ it appears to the court that:

- 224 (1) any proceedings in respect of the marriage in question, or capable of affecting its validity or subsistence, are continuing in another jurisdiction⁵; and
- 225 (2) the balance of fairness, including convenience, as between the parties to the marriage, is such that it is appropriate for the proceedings in that jurisdiction to be disposed of before further steps are taken in the English proceedings or in those proceedings so far as they consist of a particular kind of matrimonial proceedings⁶,

the court may, if it thinks fit, order the proceedings before it to be stayed or, as the case may be, to be stayed as far as they consist of proceedings of that kind⁷. In considering for this purpose the balance of fairness and convenience, the court must have regard to all factors appearing to be relevant, including the convenience of witnesses and any delay or expense which may result from the proceedings being stayed or not being stayed⁸.

This discretionary power to order a stay may be exercised at any time after the beginning of the trial or first trial if the court declares by order that it is satisfied that a person has failed to perform his duty⁹ to furnish particulars of proceedings continuing in a jurisdiction other than England¹⁰.

A stay may be discharged on the application of any party to the proceedings if it appears to the court that the other proceedings by reference to which the stay was ordered are themselves stayed or concluded, or that a party in those other proceedings has delayed unreasonably in prosecuting them¹¹.

1 Domicile and Matrimonial Proceedings Act 1973 s 5(6)(b). As to these powers see paras 130-135 ante.

2 As to the meaning of 'the trial or first trial' see para 247 note 3 ante.

3 This means proceedings other than proceedings governed by the 'Brussels II' Regulation: see Domicile and Matrimonial Proceedings Act 1973 s 5(6), Sch 1 para 9(1) (Sch 1 para 9(1) as amended by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310, reg 4); and paras 242-243 ante. For the meaning of 'matrimonial proceedings' see para 247 note 1 ante. As to the 'Brussels II' Regulation see para 242 note 4 ante. The Domicile and Matrimonial Proceedings Act 1973 s 5(6), Sch 1 para 9 has been prospectively amended by the Family Law Act 1996 s 19(5), Sch 3 para 7. At the date at which this volume states the law no day had been appointed for the commencement of the amending provisions. The Lord Chancellor has announced that the Family Law Act 1996 Pt II (ss 2-25) will not be implemented and the relevant provisions of that Act (which include the amendments effected by s 19(5), Sch 3 para 7) will be repealed without being brought into force: see 620 HL Official Report (5th series), 16 January 2001, written answers col 126.

4 For the meaning of 'court' see para 243 note 2 ante. As to the meaning of 'continuing in the court' see para 248 note 3 ante.

5 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9(1)(a). For the meaning of 'another jurisdiction' see para 247 note 6 ante. See also MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARAS 842-843. The Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9(1) has been prospectively amended by the Family Law Act 1996 Sch 3 para 7; but see note 3 supra.

6 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9(1)(b). As to the meanings of 'England', 'English' and 'English law' see para 4 ante. The Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9(1) has been prospectively amended by the Family Law Act 1996 Sch 3 para 7; but see note 3 supra.

7 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9(1) (as amended: see note 3 supra). If, at any time after the beginning of the trial or first trial in any matrimonial proceedings which are pending in the court, the court declares by order that it is satisfied that a person has failed to perform the duty imposed on him by Sch 1 para 7, then Sch 1 para 9(1) has effect in relation to those proceedings and, to the other proceedings by reference to which the declaration is made, as if the words 'before the beginning of the trial or first trial' were omitted; but no action lies in respect of the failure of a person to perform such a duty: Sch 1 para 9(4). The power may not be exercised in the case of any proceedings, so far as they are proceedings for divorce, while an application for an obligatory stay of those proceedings (see para 248 ante) is pending: Sch 1 para 9(3). An application for a stay under these provisions must be made to a judge: Family Proceedings Rules 1991, SI 1991/1247, r 2.27(2). The Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 7 has been prospectively substituted by the Family Law Act 1996 Sch 3 para 5; and the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9(1), (3), (4) has been prospectively amended by the Family Law Act 1996 Sch 3 para 7; but see note 3 supra.

A stay should always be applied for as soon as possible and practitioners must appreciate that, if a stay is not promptly applied for, there is a considerable risk that one will not later be granted: *Kreng v Kreng* [1999] 1 FLR 969, [1999] Fam Law 304 per curiam (it was said that *W v W (Financial Relief: Appropriate Forum)* [1997] 2 FCR 659, [1997] 1 FLR 257 cannot be relied on to justify delayed applications for a stay).

8 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9(2). See *R v R (Divorce: Stay of Proceedings)* [1994] 2 FLR 1036; *T v T (Jurisdiction: Forum Conveniens)* [1995] 1 FCR 478, [1995] 2 FLR 660; *R v R (Divorce: Stay of Proceedings)* [1995] 1 FCR 745, [1994] 2 FLR 1036; *T v T (Jurisdiction: Forum Conveniens)* [1995] 1 FCR 478, [1995] 2 FLR 660; *W v W (Financial Relief: Appropriate Forum)* [1997] 2 FCR 659, [1997] 1 FLR 257; *S v S (Matrimonial Proceedings: Appropriate Forum)* [1997] 1 WLR 1200, sub nom *S v S (Divorce: Staying Proceedings)* [1997] 3 FCR 272; *C v C (Divorce: Stay of English Proceedings)* [2001] 1 FLR 624; *Butler v Butler* [1997] 2 All ER 822, [1998] 1 WLR 1208, CA (applying *de Dampierre v de Dampierre* [1988] AC 92, [1987] 2 All ER 1, HL). See also the earlier cases (which must be read in the light of *de Dampierre v de Dampierre* supra): *Shemshadford v Shemshadford* [1981] 1 All ER 726; *Gadd v Gadd* [1985] 1 All ER 58, [1984] 1 WLR 1435, CA; *Thyssen-Bornemisza v Thyssen-Bornemisza* [1986] Fam 1, [1985] 1 All ER 328, CA.

See also *Otobo v Otobo* [2002] EWCA Civ 949, [2002] 3 FCR 123 (the recognition of an English decree and the validity of a marriage in a competing jurisdiction was wrongly considered in the exercise of the judge's discretion).

9 In his duty under the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 7: see para 247 ante. The Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 7 has been prospectively substituted by the Family Law Act 1996 Sch 3 para 5; but see note 3 supra.

10 See Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 9(4). Schedule 1 para 9(4) has been prospectively amended by the Family Law Act 1996 Sch 3 para 7; but see note 3 supra.

11 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 10(1). As to applications for the discharge of a stay see para 248 note 11 ante. Where, on giving directions for trial, it appears to a district judge from any information given in the required particulars (see para 247 note 5 ante) that any proceedings in respect of the marriage or capable of affecting its validity or subsistence are continuing in any country outside England, and he considers that the question whether the proceedings on the petition should be stayed under Sch 1 para 9 ought to be determined by the court, he must fix a date, time and place for consideration of the question by a judge, and notify the parties accordingly: Family Proceedings Rules 1991, SI 1991/1247, r 2.27(3). The Domicile and Matrimonial Proceedings Act 1973 Sch 1 paras 9, 10 have been prospectively amended by the Family Law Act 1996 Sch 3 paras 7, 8; but see note 3 supra.

UPDATE

249 Discretionary stays

NOTE 8--See also *Ella v Ella* [2007] EWCA Civ 99, [2007] 3 FCR 768.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/C. STAYING OF MATRIMONIAL PROCEEDINGS/(B) Under other Statutes/250. Effect of stay on ancillary orders.

250. Effect of stay on ancillary orders.

Where proceedings for divorce, judicial separation or nullity of marriage are stayed by reference to proceedings in a related jurisdiction¹ for divorce, judicial separation or nullity of marriage², then, without prejudice to any other effect of the stay³, any relevant order⁴ made in connection with the stayed proceedings ceases to have effect on the expiration of three months beginning with the date on which the stay was imposed, unless the stay is earlier removed or discharged⁵ or the court orders otherwise so as to deal with circumstances needing to be dealt with urgently⁶. After imposing a stay, the English court has no power to make a relevant order, or a lump sum order⁷ in connection with the stayed proceedings⁸ unless the court considers that it is necessary to do so to deal with circumstances needing to be dealt with urgently⁹.

If, when the stay is imposed, there is in force or there subsequently comes into force an order made in connection with the other proceedings which makes provision for periodical payments for a spouse or child or for certain other matters relating to a child¹⁰, then, when the stay is imposed or, as the case may be, when the other court's order comes into force¹¹, any relevant order¹² of the English court in respect of the same subject matter ceases to have effect¹³. The English court may not make a similar order¹⁴, and if the other order contains provisions for periodical payments for a child, the English court has no power to make a lump sum order for that child¹⁵.

If proceedings are stayed so far as they consist of matrimonial proceedings¹⁶ of a particular kind, but not so far as they consist of matrimonial proceedings of a different kind, the provisions described above do not apply; however, without prejudice to the effect of the stay apart from those provisions, the court does not have power to make a relevant order or a lump sum order in connection with the proceedings so far as they are stayed¹⁷.

Nothing in the provisions described above affects any power of the English court to vary or discharge a relevant order so far as it is in force¹⁸, to enforce it for any period when it is or was in force¹⁹, or to make a relevant order or a lump sum order in connection with proceedings which were but are no longer stayed²⁰.

¹ For the meaning of 'related jurisdiction' see para 248 note 5 ante.

² In pursuance of the Domicile and Matrimonial Proceedings Act 1973 s 5(6), Sch 1 (as amended): see Sch 1 paras 8, 9; and paras 248-249 ante.

³ Ibid Sch 1 para 11(2). See also MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 844.

⁴ 'Relevant order' is defined by ibid Sch 1 para 11(1) (amended by the Children Act 1989 s 108(5), Sch 13 para 33); and the Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(3A) (added by the Matrimonial Homes and Property Act 1981 s 8(3)) as follows:

⁹³ (1) an order under the Matrimonial Causes Act 1973 s 22 (existing order for maintenance of a spouse pending suit) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 456);

⁹⁴ (2) such an order as is mentioned in s 23(1)(d) or s 23(1)(e) (periodical payments for children), being an order made under s 23(1) or s 23(2)(a) (together with any related order made under s 24A(1) (as added) as to the sale of property); or an order made in equivalent circumstances under the Children Act 1989 s 15(1), Sch 1 (as amended) and of a kind mentioned in Sch 1 para 1(2)(a) or Sch 1 para 1(2)(b) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 539);

- 95 (3) an order under the Matrimonial Causes Act 1973 s 42(1)(a) (repealed with savings) (custody and education of children), or the Children Act 1989 s 8 (contact, residence, prohibited steps or specific issue orders) (CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 247 et seq); and
- 96 (4) (except for the purposes of the Domicile and Matrimonial Proceedings Act 1973 s 5(6), Sch 1 para 11(3): see the text and notes 11-15 *infra*) any order restraining a person from removing a child out of England or out of the care of another person.

Schedule 1 para 11 has been prospectively amended by the Family Law Act 1996 s 19(5), Sch 3 paras 1, 9. At the date at which this volume states the law no day had been appointed for the commencement of the amending provisions. The Lord Chancellor has announced that the Family Law Act 1996 Pt II (ss 2-25) will not be implemented and the relevant provisions of that Act (which include the amendments effected by s 19(5), Sch 3 paras 1, 9) will be repealed without being brought into force: see 620 HL Official Report (5th series), 16 January 2001, written answers col 126. As to the meanings of 'England', 'English' and 'English law' see para 4 *ante*. In England, under the Children Act 1989, the term 'parental responsibility' is used in preference to the term 'custody': see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 133 et seq.

5 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(2)(b).

6 See *ibid* Sch 1 para 11(2)(c).

7 'Lump sum order' means an order mentioned in the Matrimonial Causes Act 1973 s 23(1)(f), being an order made under s 23(1) or s 23(2)(a) or an order made in equivalent circumstances under the Children Act 1989 Sch 1 (as amended) and of a kind mentioned in Sch 1 para 1(2)(c) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 539): Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(1) (as amended: see note 4 *supra*).

8 *Ibid* Sch 1 para 11(2)(a).

9 *Ibid* Sch 1 para 11(2)(c).

10 The provision which could be made by an order under the Children Act 1989 s 8: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 247 et seq.

11 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(3) (amended by the Children Act 1989 Sch 13 para 33(1)).

12 See note 4 *supra*.

13 Domicile and Matrimonial Proceedings Act 1973 Sch 1 para 11(3)(a). Note, however, that the making by the other court of any of the orders referred to in the text has no effect on a previous order of the English court ordering a lump sum payment for a child, or restraining a person from removing a child out of the jurisdiction or out of the care of another person.

14 *Ibid* Sch 1 para 11(3)(b). See note 13 *supra*.

15 *Ibid* Sch 1 para 11(3)(c). See note 13 *supra*.

16 For the meaning of 'matrimonial proceedings' see para 247 note 1 *ante*. However, for the purposes of *ibid* Sch 1 para 11(4) matrimonial proceedings do not include proceedings for a declaration: Sch 1 para 11(4).

17 *Ibid* Sch 1 para 11(4).

18 *Ibid* Sch 1 para 11(5)(a).

19 *Ibid* Sch 1 para 11(5)(b).

20 *Ibid* Sch 1 para 11(5)(c).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/D. RECOGNITION OF DIVORCES, ANNULMENTS AND LEGAL SEPARATIONS/(A) Recognition under the 'Brussels II' Regulation/251. Recognition of a judgment under the 'Brussels II' Regulation.

D. RECOGNITION OF DIVORCES, ANNULMENTS AND LEGAL SEPARATIONS

(A) RECOGNITION UNDER THE 'BRUSSELS II' REGULATION

251. Recognition of a judgment under the 'Brussels II' Regulation.

The 'Brussels II' Regulation¹ provides that a judgment² given in another member state must be recognised in England³ without any special procedure being required⁴. No special procedure is required for updating the civil-status records on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another member state, and against which no further appeal lies under the law of that member state⁵.

However, an interested party may apply for a decision that the judgment be recognised or not be recognised⁶. Where the outcome of proceedings in a court of a member state depends on the determination of an incidental question of recognition⁷, that court has jurisdiction over that question⁸.

1 As to the 'Brussels II' Regulation see para 242 note 4 ante.

2 For the purposes of the 'Brussels II' Regulation, 'judgment' means a divorce, legal separation or marriage annulment pronounced by a court of a member state (as well as a judgment relating to the parental responsibility of the spouses given on the occasion of such matrimonial proceedings: see para 265 post) whatever the judgment may be called, including a decree, order or decision: art 13 para 1. The provisions of Ch 3 (arts 14-35) apply also to the determination of the amount of costs and expenses of proceedings under the Regulation and to the enforcement of any order concerning such costs and expenses: art 13 para 2. For the meaning of 'member state' see para 242 note 4 ante.

3 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 'Brussels II' Regulation art 14 para 1.

Documents which have been formally drawn up or registered as authentic instruments and are enforceable in one member state and also settlements which have been approved by a court in the course of proceedings and are enforceable in the member state in which they were concluded are recognised and declared enforceable under the same conditions as judgments (as to which see note 2 supra): art 13 para 3. However, the provisions of the Regulation apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments, and to settlements which have been approved by a court in the course of proceedings after 1 March 2001: art 42 para 1.

With regard to a member state in which two or more systems of law or sets of rules concerning matters governed by the Regulation apply in different territorial units:

97 (1) any reference to the authority of a member state having received an application for divorce or legal separation or for marriage annulment refers to the authority of a territorial unit which has received such an application (art 41 para (c)); and

98 (2) any reference to the rules of the requested member state refers to the rules of the territorial unit in which jurisdiction, recognition or enforcement is invoked (art 41 para (d)).

5 Ibid art 14 para 2.

6 Ibid art 14 para 3. The procedures are as provided for in Ch III, Section 2 (arts 21-31) and Section 3 (arts 32-35) of the Regulation. In relation to procedures for applications seeking the recognition or non-recognition of

a judgment, the local jurisdiction is determined by the internal law of the member state in which proceedings for recognition or non-recognition are brought: art 22 para 3. As to the non-recognition of judgments under the Regulation see para 258 post.

7 As to incidental questions see para 9 ante.

8 'Brussels II' Regulation art 14 para 4.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/D. RECOGNITION OF DIVORCES, ANNULMENTS AND LEGAL SEPARATIONS/(A) Recognition under the 'Brussels II' Regulation/252. Effect of a pending appeal upon the obligation to recognise a judgment.

252. Effect of a pending appeal upon the obligation to recognise a judgment.

Where recognition is sought in an English court¹ of a judgment² given in another member state³, the court may stay the proceedings if an ordinary appeal has been lodged against the judgment and (in the case of a judgment given in the Republic of Ireland) if enforcement is suspended in the Republic of Ireland by reason of an appeal⁴.

1 For the meaning of 'court' see para 242 note 3 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 For the meaning of 'judgment' for these purposes see para 251 note 2 ante.

3 For the meaning of 'member state' see para 242 note 4 ante.

4 'Brussels II' Regulation art 20. As to the 'Brussels II' Regulation see para 242 note 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/D. RECOGNITION OF DIVORCES, ANNULMENTS AND LEGAL SEPARATIONS/(B) Recognition under other Statutes/253. Recognition of divorces, annulments and judicial separations granted in the British Islands.

(B) RECOGNITION UNDER OTHER STATUTES

253. Recognition of divorces, annulments and judicial separations granted in the British Islands.

Where the 'Brussels II' Regulation does not apply¹, the validity of any divorce, annulment² or judicial separation granted by a court of civil jurisdiction in any part of the British Islands³ is recognised throughout the United Kingdom⁴ subject to specified grounds on which recognition may be refused⁵. However, no divorce or annulment obtained in any part of the British Islands is regarded as effective in any part of the United Kingdom⁶ unless granted by a court of civil jurisdiction⁷.

Where these provisions require or preclude the recognition of the validity of a divorce, annulment or judicial separation granted before 4 April 1988, they do not affect any property to which any person became entitled before that date, or affect the recognition of the validity of the divorce, annulment or separation if that matter has been decided by any competent court in the British Islands before that date⁸.

A divorce obtained in any part of the British Islands before 1 January 1974 is to be recognised in all parts of the United Kingdom if it was recognised as valid under rules of law applicable before that date⁹.

1 As to the recognition of judgments under the 'Brussels II' Regulation see paras 251-252 ante. As to the 'Brussels II' Regulation see para 242 note 4 ante.

2 'Annulment' includes any decree or declaration of nullity of marriage, however expressed: Family Law Act 1986 s 54(1).

3 For the meaning of 'the British Islands' see para 4 ante.

4 For the meaning of 'United Kingdom' see para 4 ante.

5 Family Law Act 1986 s 44(2). As to the specified grounds see s 51; and para 259 post.

6 For the meaning of 'part of the United Kingdom' see para 230 note 3 ante.

7 Family Law Act 1986 s 44(1), which is expressed to be subject to s 52(4), (5)(a) (see the text and note 9 infra). A bare talak pronounced in England, although valid under the law of the parties' common domicile, is not entitled to recognition under s 44(1) as its validity is not dependent on the participation or authorisation of judicial authorities: *Sulaiman v Juffal* [2002] 1 FLR 479. See also para 256 post.

8 Family Law Act 1986 s 52(1)(a), (2).

9 Ibid s 52(4), (5)(a). The practical effect of these provisions is to permit the recognition of those extra-judicial divorces which have been obtained in the British Islands before the relevant date, and which are recognised under the law of the parties' common domicile. See *Armitage v A-G* [1906] P 135; *Har-Shefi v Har-Shefi* (No 2) [1953] P 220, [1953] 2 All ER 373; *Qureshi v Qureshi* [1972] Fam 173, [1971] 1 All ER 325.

UPDATE

253-257 Recognition under other Statutes

Provision for civil partnerships corresponding to the provision made for the recognition of foreign divorces by the Family Law Act 1986 ss 44-51 is made by the Civil Partnership Act 2004 ss 233-238 and the Civil Partnership (Supplementary Provisions relating to the Recognition of Overseas Dissolutions, Annulments or Legal Separations) (England and Wales and Northern Ireland) Regulations 2005, SI 2005/3104. See further PARA 260A.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/D. RECOGNITION OF DIVORCES, ANNULMENTS AND LEGAL SEPARATIONS/(B) Recognition under other Statutes/254. Recognition of divorces, annulments and legal separations granted overseas by non-member states.

254. Recognition of divorces, annulments and legal separations granted overseas by non-member states.

Where the 'Brussels II' Regulation does not apply¹, the validity of an overseas divorce, annulment² or legal separation³ is recognised in the United Kingdom if, and only if, it is entitled to recognition by virtue of the relevant provisions of the Family Law Act 1986⁴ or any other enactment⁵. The provisions of the Act apply to overseas divorces, annulments and legal separations whenever obtained⁶, but do not affect any property to which any person became entitled before 4 April 1988 or the recognition of the validity of the divorce, annulment or separation if that matter has been decided by any competent court in the British Islands before that date⁷.

1 As to the recognition of judgments under the 'Brussels II' Regulation see paras 251-252 ante. As to the 'Brussels II' Regulation see para 242 note 4 ante.

2 For the meaning of 'annulment' for these purposes see para 253 note 2 ante.

3 I.e. a divorce, annulment or legal separation obtained in a country outside the British Islands. 'Country' includes a colony or other dependent territory of the United Kingdom; but for these purposes a person is to be treated as a national of such a territory only if it has a law of citizenship or nationality separate from that of the United Kingdom and he is a citizen or national of that territory under that law: Family Law Act 1986 s 54(2). Any reference to a dependent territory within the meaning of the British Nationality Act 1981 (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM) is a reference to a British overseas territory: see the British Overseas Territories Act 2002 s 1(2). For the meaning of 'United Kingdom' see para 4 ante. For the meaning of 'the British Islands' see para 4 ante. As to British overseas territories see COMMONWEALTH vol 13 (2009) PARA 702.

4 I.e. the Family Law Act 1986 ss 46-49: see paras 255-257 post.

5 Ibid s 45(1) (renumbered by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310, reg 9(a)). The Family Law Act 1986 s 45(1) (as renumbered) does not apply to an overseas divorce, annulment or legal separation for which recognition is provided under the 'Brussels II' Regulation arts 14-20: Family Law Act 1986 s 45(2) (added by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310, reg 9(b)). The reference to other enactments seems to refer principally to decrees whose effect is also preserved by other provisions of the Family Law Act: see s 52(4), (5)(b)-(e). Under those provisions, certain divorces, annulments and legal separations are to be recognised in the United Kingdom whether or not they are entitled to recognition by virtue of other provisions of the Act: s 52(4). They are:

- 99 (1) overseas divorces recognised as valid under the Recognition of Divorces and Legal Separations Act 1971 (repealed) and not affected by the Domicile and Matrimonial Proceedings Act 1973 s 16(2) (repealed) (proceedings otherwise than in a court of law where both parties are resident in the United Kingdom) (Family Law Act 1986 s 52(5)(b));
- 100 (2) divorces of which the decree was registered under the Indian and Colonial Divorce Jurisdiction Act 1926 s 1 (repealed) (Family Law Act 1986 s 52(5)(c));
- 101 (3) divorces or annulments recognised as valid under the Matrimonial Causes (War Marriages) Act 1944 s 4 (repealed) (Family Law Act 1986 s 52(5)(d)); and
- 102 (4) overseas legal separations recognised as valid under the Recognition of Divorces and Legal Separations Act 1971 (repealed) (Family Law Act 1986 s 52(5)(e)).

As to the grounds upon which recognition may be refused see s 51; and para 259 post.

6 Ibid s 52(1)(b).

7 Ibid s 52(2).

UPDATE

253-257 Recognition under other Statutes

Provision for civil partnerships corresponding to the provision made for the recognition of foreign divorces by the Family Law Act 1986 ss 44-51 is made by the Civil Partnership Act 2004 ss 233-238 and the Civil Partnership (Supplementary Provisions relating to the Recognition of Overseas Dissolutions, Annulments or Legal Separations) (England and Wales and Northern Ireland) Regulations 2005, SI 2005/3104. See further PARA 260A.

254 Recognition of divorces, annulments and legal separations granted overseas by non-member states

NOTE 5--1986 Act s 54(2) amended: European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/D. RECOGNITION OF DIVORCES, ANNULMENTS AND LEGAL SEPARATIONS/(B) Recognition under other Statutes/255. Overseas divorces etc obtained by means of proceedings.

255. Overseas divorces etc obtained by means of proceedings.

The validity of an overseas divorce, annulment¹ or legal separation² obtained by means of proceedings³ is to be recognised⁴, subject to specified grounds on which recognition may be refused⁵, if:

- 226 (1) the divorce, annulment or legal separation is effective under the law of the country in which it was obtained⁶; and
- 227 (2) at the relevant date⁷, either party to the marriage was habitually resident⁸ in the country in which the divorce, annulment or legal separation was obtained, or was domiciled in that country⁹, or was a national of that country¹⁰.

Where there have been cross-proceedings, the validity of an overseas divorce, annulment or legal separation obtained either in the original proceedings or in the cross-proceedings is to be recognised in England if the requirements for recognition¹¹ are satisfied in relation to the date of the commencement either of the original proceedings or of the cross-proceedings, and the validity of the divorce, annulment or legal separation is otherwise entitled to recognition¹².

Where a legal separation, the validity of which is entitled to recognition, is converted, in the country in which it was obtained, into a divorce which is effective under the law of that country, the validity of the divorce is to be recognised whether or not it would itself be entitled to recognition under the rules described above¹³.

For the purpose of deciding whether an overseas divorce, annulment or legal separation obtained by means of proceedings is entitled to recognition by virtue of the provisions described above¹⁴, any finding of fact¹⁵ made (whether expressly or by implication) in the proceedings and on the basis of which jurisdiction was assumed is, where both parties to the marriage took part in the proceedings¹⁶, conclusive evidence of the fact found, and, in any other case, sufficient proof of that fact unless the contrary is shown¹⁷.

1 For the meaning of 'annulment' for these purposes see para 253 note 2 ante.

2 The one obtained outside the British Islands: Family Law Act 1986 s 45 (see para 254 ante). For the meaning of 'the British Islands' see para 4 ante.

3 'Proceedings' means judicial or other proceedings: *ibid* s 54(1). It follows that certain divorces formerly categorised as extra-judicial are therefore capable of recognition under these provisions: see para 256 post.

4 *Ibid* s 46(1).

5 *Ibid* s 51. See para 259 post.

6 *Ibid* s 46(1)(a). Under the Family Law Act 1986, 'effective' does not necessarily mean 'valid'; effectiveness connotes a less rigorous standard than validity: *Kellman v Kellman* [2000] 1 FLR 785. As to earlier legislation to the same effect as the Family Law Act 1986 s 46(1)(a) see *Adams v Adams (A-G intervening)* [1971] P 188, [1970] 3 All ER 572; *M v R* (1971) Times, 6 December (judge's appointment unconstitutional); *Torok v Torok* [1973] 3 All ER 101, [1973] 1 WLR 1066 (as to decrees not yet effective in the foreign country). See also the statement of facts in *Woodland v Woodland (otherwise Belin)* [1928] P 169 (want of formal registration).

7 le the date of the commencement of the proceedings: see the Family Law Act 1986 s 46(3)(a). Where in the case of an overseas annulment, the proceedings were commenced after the death of either party to the marriage, the relevant date in relation to that party is the date of death: s 46(4).

8 As to the meaning of habitually resident see *Kapur v Kapur* [1984] FLR 920; and paras 59-61 ante.

9 For this purpose, a party is treated as domiciled in a country if he was domiciled there either according to the law of that country relating to family matters or according to the law of England: Family Law Act 1986 s 46(5). As to the meanings of 'England', 'English' and 'English law' see para 4 ante. All parts of the proceedings must take place within a single country: *Re Fatima* [1986] AC 527, sub nom *Fatima v Secretary of State for the Home Department* [1986] 2 All ER 32, HL (decided under the Recognition of Divorces and Legal Separations Act 1971 (repealed)); *Berkovits v Grinberg (A-G intervening)* [1995] Fam 142, [1995] 2 All ER 681.

10 Family Law Act 1986 s 46(1)(b). As to the application of these rules in federal and composite states see s 49; and para 257 post.

11 le those of *ibid* s 46(1)(b).

12 *Ibid* s 47(1).

13 *Ibid* s 47(2).

14 le by virtue of *ibid* s 46 or s 47.

15 le a finding that either party to the marriage was habitually resident in the country in which the divorce, annulment or legal separation was obtained, or was under the law of that country domiciled there, or was a national of that country: *ibid* s 48(2).

16 A spouse who appears in the proceedings is treated as having taken part: *ibid* s 48(3). See also *Torok v Torok* [1973] 3 All ER 101 at 104, [1973] 1 WLR 1066 at 1069.

17 Family Law Act 1986 s 48(1).

UPDATE

253-257 Recognition under other Statutes

Provision for civil partnerships corresponding to the provision made for the recognition of foreign divorces by the Family Law Act 1986 ss 44-51 is made by the Civil Partnership Act 2004 ss 233-238 and the Civil Partnership (Supplementary Provisions relating to the Recognition of Overseas Dissolutions, Annulments or Legal Separations) (England and Wales and Northern Ireland) Regulations 2005, SI 2005/3104. See further PARA 260A.

255 Overseas divorces etc obtained by means of proceedings

NOTE 6--See also *H v H (talaq divorce)* [2007] EWHC 2945 (Fam), [2008] 2 FLR 857, [2007] All ER (D) 202 (Dec).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/D. RECOGNITION OF DIVORCES, ANNULMENTS AND LEGAL SEPARATIONS/(B) Recognition under other Statutes/256. Overseas divorces etc obtained otherwise than by means of proceedings.

256. Overseas divorces etc obtained otherwise than by means of proceedings.

Different, and more limited, grounds for recognition apply to divorces, annulments and separations obtained otherwise than by means of proceedings¹.

The validity of an overseas divorce, annulment² or legal separation³ obtained otherwise than by means of proceedings is to be recognised, subject to specified grounds on which recognition may be refused⁴, if:

- 228 (1) the divorce, annulment or legal separation is effective under the law of the country in which it was obtained; and
- 229 (2) at the relevant date⁵:
- 17
- 24. (a) each party to the marriage was domiciled⁶ in that country; or
- 25. (b) either party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the divorce, annulment or legal separation is recognised as valid; and
- 18
- 230 (3) neither party to the marriage was habitually resident⁷ in the United Kingdom⁸ throughout the period of one year immediately preceding that date⁹.

Where a legal separation, the validity of which is entitled to recognition¹⁰, is converted, in the country in which it was obtained, into a divorce which is effective under the law of that country, the validity of the divorce is to be recognised whether or not it would itself be entitled to recognition under the rules described above¹¹.

1 The precise scope of 'proceedings', defined by the Family Law Act 1986 to include judicial and other proceedings (see s 54(1); and para 255 note 3 ante), in this context remains unclear, but something more is required than mere acts by the parties which will be recognised as effective in the country in which they occur: see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 743-748. So, a talak, by which under Islamic law a husband can divorce his wife by oral declaration, will not be regarded as involving proceedings (*Chaudhary v Chaudhary* [1985] Fam 19, [1984] 3 All ER 1017, CA), unless, as in Pakistan, some form of registration by a state body is required (*Quazi v Quazi* [1980] AC 744, [1979] 3 All ER 897, HL) (both cases decided under the similar but not identical provisions of the Recognition of Divorces and Legal Separations Act 1971 (repealed)). A ghet, which in practice involves the officers of a rabbinical court, involves proceedings: *Berkovits v Grinberg (A-G intervening)* [1995] Fam 142, [1995] 2 All ER 681. The assembly of a Sharia court and its recognition of a divorce as irrevocable followed by its registration as such also constitutes 'proceedings': *El Fadl v El Fadl* [2000] 1 FCR 685.

2 For the meaning of 'annulment' for these purposes see para 253 note 2 ante.

3 I.e. one obtained outside the British Islands: Family Law Act 1986 s 45 (see para 254 ante). All parts of the process must take place within a single country: *Re Fatima* [1986] AC 527, sub nom *Fatima v Secretary of State for the Home Department* [1986] 2 All ER 32, HL (decided under the Recognition of Divorces and Legal Separations Act 1971 (repealed)); *Berkovits v Grinberg (A-G intervening)* [1995] Fam 142, [1995] 2 All ER 681. For the meaning of 'the British Islands' see para 4 ante.

4 I.e. subject to the Family Law Act 1986 s 51: see para 259 post.

5 le the date on which it was obtained: *ibid* s 46(3)(b). Where, in the case of an overseas annulment, the relevant date fell after the death of either party to the marriage, the relevant date in relation to that party is the date of death: s 46(4).

6 As to domicile for this purpose see para 255 note 9 ante.

7 As to the meaning of 'habitually resident' see *Kapur v Kapur* [1984] FLR 920; and paras 59-61 ante.

8 For the meaning of 'United Kingdom' see para 4 ante.

9 Family Law Act 1986 s 46(2). As to the application of these rules in federal and composite states see s 49; and para 257 post.

10 le entitled to recognition by virtue of *ibid* s 46 or s 47(1) (cross-proceedings and divorce following legal separation).

11 *Ibid* s 47(2).

UPDATE

253-257 Recognition under other Statutes

Provision for civil partnerships corresponding to the provision made for the recognition of foreign divorces by the Family Law Act 1986 ss 44-51 is made by the Civil Partnership Act 2004 ss 233-238 and the Civil Partnership (Supplementary Provisions relating to the Recognition of Overseas Dissolutions, Annulments or Legal Separations) (England and Wales and Northern Ireland) Regulations 2005, SI 2005/3104. See further PARA 260A.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/D. RECOGNITION OF DIVORCES, ANNULMENTS AND LEGAL SEPARATIONS/(B) Recognition under other Statutes/257. Application to federal and composite states.

257. Application to federal and composite states.

In relation to a country¹ comprising territories in which different systems of law are in force in matters of divorce, annulment² or legal separation, the provisions as to recognition are modified³.

In the case of a divorce, annulment or legal separation obtained by proceedings, the recognition of the validity of which depends on the domicile or habitual residence of a party to the marriage⁴, the relevant provisions⁵ are to be read as if each territory were a separate country⁶.

In the case of a divorce, annulment or legal separation obtained by proceedings, the recognition of the validity of which depends upon the nationality of a party to a marriage⁷, the divorce, annulment or separation must be effective throughout the country and not merely in the territory in which it was granted⁸.

In the case of a divorce, annulment or legal separation obtained otherwise than by means of proceedings, the recognition of the validity of which depends on the domicile of a party to the marriage⁹, the relevant provisions¹⁰ have effect as if each territory were a separate country¹¹.

1 As to the meaning of 'country' for these purposes see para 254 note 3 ante.

2 For the meaning of 'annulment' for these purposes see para 253 note 2 ante.

3 See the Family Law Act 1986 s 49(1). See *Emin v Yeldag* [2002] 1 FLR 956 (for the purposes of the Family Law Act 1986 s 49(1), the island of Cyprus comprises two parts in which different systems of law are in force on matters of divorce). A court can recognise a divorce issued by the court of an unrecognised state so long as recognition is not inconsistent with government policy and so long as the divorce is made in accordance with the law of that state: *Emin v Yeldag* supra. Cf *B v B (Divorce: Northern Cyprus)* [2001] 3 FCR 331.

4 Ie on the satisfaction of the criteria in the Family Law Act 1986 s 46(1)(b)(i) or (ii): see para 255 ante.

5 Ie *ibid* ss 46(1), 47(2): see para 255 ante.

6 *Ibid* s 49(2).

7 Ie on the satisfaction of the criterion in *ibid* s 46(1)(b)(iii): see para 255 ante.

8 *Ibid* s 49(3), providing for a variant version of ss 46(1)(a), 47(2). The provisions of s 48(2) as to findings of fact by the foreign court are to be read as if each territory were a separate country: s 49(5).

9 Ie on the satisfaction of the criteria in *ibid* s 46(2)(b): see para 256 ante.

10 See *ibid* s 47(2) (in the case of a legal separation: see para 255 ante), s 52(3), (4), (see paras 253-254 ante).

11 *Ibid* s 49(4).

UPDATE

253-257 Recognition under other Statutes

Provision for civil partnerships corresponding to the provision made for the recognition of foreign divorces by the Family Law Act 1986 ss 44-51 is made by the Civil Partnership Act 2004 ss 233-238 and the Civil Partnership (Supplementary Provisions relating to the Recognition of Overseas Dissolutions, Annulments or Legal Separations) (England and Wales and Northern Ireland) Regulations 2005, SI 2005/3104. See further PARA 260A.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/D. RECOGNITION OF DIVORCES, ANNULMENTS AND LEGAL SEPARATIONS/(C) Refusal of Recognition under the 'Brussels II' Regulation/258. Grounds of non-recognition of divorces, etc.

(C) REFUSAL OF RECOGNITION UNDER THE 'BRUSSELS II' REGULATION

258. Grounds of non-recognition of divorces, etc.

A judgment¹ relating to divorce, legal separation or marriage annulment given in another member state² must not be recognised in an English court under the 'Brussels II' Regulation³:

- 231 (1) if such recognition is manifestly contrary to English public policy⁴; or
- 232 (2) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally⁵; or
- 233 (3) if it is irreconcilable with a judgment given in English proceedings between the same parties⁶; or
- 234 (4) if it is irreconcilable with an earlier judgment given in another member state or in a non-member state between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in England⁷.

1 For the meaning of 'judgment' in this context see para 251 note 2 ante.

2 For the meaning of 'member state' see para 242 note 4 ante.

3 For the meaning of 'the 'Brussels II' Regulation' see para 242 note 4 ante. As to recognition under the Regulation see para 251 ante. For the meaning of 'court' see para 242 note 3 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 'Brussels II' Regulation art 15 para 1(a). The test of public policy may not be applied to the rules relating to jurisdiction set out in the Regulation (see arts 2-8; and paras 242-243 ante, 265 post), so that the jurisdiction of the court of the member state of origin may not be reviewed: art 17. Nor may a judgment, under any circumstances, be reviewed as to its substance (art 19) or refused recognition because the law of the member state in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts (art 18). However, a court of a member state may, on the basis of an agreement on the recognition and enforcement of judgments, not recognise a judgment given in another member state where the judgment could not be founded on the grounds of jurisdiction provided for (ie arts 2-7) and the alternative grounds applied (ie art 8): art 16.

5 Ibid art 15 para 1(b).

6 Ibid art 15 para 1(c).

7 Ibid art 15 para 1(d).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/D. RECOGNITION OF DIVORCES, ANNULMENTS AND LEGAL SEPARATIONS/(D) Refusal of Recognition under other Statutes/259. Grounds for refusing recognition of divorces etc.

(D) REFUSAL OF RECOGNITION UNDER OTHER STATUTES

259. Grounds for refusing recognition of divorces etc.

Recognition of the validity of:

- 235 (1) a divorce, annulment¹ or judicial separation granted by a court of civil jurisdiction in any part of the British Islands²; or
- 236 (2) an overseas divorce, annulment or legal separation³,

may be refused in England⁴ if the divorce, annulment or separation was granted or obtained at a time when it was irreconcilable with a decision determining the question of the subsistence or validity of the marriage of the parties previously given by a court of civil jurisdiction in England or by a court elsewhere and recognised or entitled to be recognised in England⁵.

Recognition of such a divorce or separation may also be so refused if it was granted or obtained at a time when, according to English law (including its rules of private international law⁶ and the provisions of the Family Law Act 1986⁷), there was no subsisting marriage between the parties⁸.

Recognition⁹ of the validity of an overseas divorce, annulment or legal separation obtained by means of proceedings¹⁰ may be refused if:

- 237 (a) it was obtained without such steps having been taken for giving notice of the proceedings to a party to the marriage as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken¹¹; or
- 238 (b) without a party to the marriage having been given, for any reason other than lack of notice, such opportunity to take part in the proceedings as, having regard to those matters, he should reasonably have been given¹².

In the case of a divorce, annulment or legal separation obtained otherwise than by means of proceedings¹³, recognition may be refused if:

- 239 (i) there is no official¹⁴ document certifying that the divorce, annulment or legal separation is effective under the law of the country in which it was obtained¹⁵; or
- 240 (ii) where either party to the marriage was domiciled¹⁶ in another country at the relevant date¹⁷, there is no official document certifying that the divorce, annulment or legal separation is recognised as valid under the law of that other country¹⁸.

Recognition of an overseas divorce, annulment or legal separation may also be refused if to grant it would be manifestly contrary to public policy¹⁹.

The provisions as to recognition of divorces, annulments and legal separations do not require the recognition of any finding of fault made in divorce, annulment or separation proceedings, or of any maintenance, custody or other ancillary order made in any such proceedings²⁰.

- 1 For the meaning of 'annulment' for these purposes see para 253 note 2 ante.
- 2 Family Law Act 1986 s 51(1)(a). For the meaning of 'the British Islands' see para 4 ante.
- 3 Ibid s 51(1)(b). As to overseas decrees see para 254 note 2 ante.
- 4 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.
- 5 Family Law Act 1986 s 51(1). The provisions of s 51(1), (2) and (3) are subject to those of s 52 (see para 254 ante). Cf the common law rule as expressed in *Vervaeke (formerly Messina) v Smith* [1983] 1 AC 145, [1982] 2 All ER 144, HL.
- 6 As to the term 'private international law' see para 1 ante.
- 7 Ie the Family Law Act 1986 Pt II (ss 44-54).
- 8 Ibid s 51(2).
- 9 Ie by virtue of ibid s 45 (see para 254 ante).
- 10 See ibid s 51(3)(a). As to the grounds for the recognition see para 255 ante.
- 11 Ibid s 51(3)(a)(i). Cf *Shaw v A-G* (1870) LR 2 P & D 156; *Rudd v Rudd* [1924] P 72; *Boettcher v Boettcher* (1949) 93 Sol Jo 237; *Maher v Maher* [1951] P 342, [1951] 2 All ER 37; *Igra v Igra* [1951] P 404, [1951] 2 TLR 670; *Arnold v Arnold* [1957] P 237, [1957] 1 All ER 570; *Wood v Wood* [1957] P 254 at 267, [1957] 2 All ER 14, CA; *Macalpine v Macalpine* [1958] P 35, [1957] 3 All ER 134; *Sabbagh v Sabbagh* [1985] FLR 29.
Under the Family Law Act 1986, this ground is narrowly confined to circumstances where there has been a fundamental breach of natural justice: *B v B (divorce: Northern Cyprus)* [2001] 3 FCR 331.
- 12 Family Law Act 1986 s 51(3)(a)(ii). Cf *Mitford v Mitford and von Kuhlmann* [1923] P 130; *Hack v Hack* (1976) 6 Fam Law 177; *Joyce v Joyce and O'Hare* [1979] Fam 93, [1979] 2 All ER 156; *Newmarch v Newmarch* [1978] Fam 79, [1978] 1 All ER 1; *Mamdani v Mamdani* [1984] FLR 699, CA; *Sabbagh v Sabbagh* [1985] FLR 29.
- 13 See the Family Law Act 1986 s 51(3)(b). As to these cases and the applicable grounds for recognition see para 256 ante.
- 14 'Official', in relation to a document certifying that a divorce, annulment or legal separation is effective or recognised as valid under the law of any country, means issued by a person or body appointed or recognised for the purpose under that law: ibid s 52(4).
- 15 Ibid s 51(3)(b)(i). See *Wicken v Wicken* [1999] Fam 224 (under Gambian law, an authentic divorce letter effects a valid divorce and this was recognised as such upon exercise of the English court's discretion).
- 16 Ie either according to the law of that country in family matters or according to the law of England: Family Law Act 1986 s 46(5), applied by s 51(4).
- 17 As to the meaning of 'relevant date' see para 256 note 5 ante (definition applied by ibid s 51(4)).
- 18 Ibid s 51(3)(b)(ii).
- 19 Ibid s 51(3)(c). The use of the word 'manifestly' emphasises that this is a very high hurdle to clear: *Kellman v Kellman* [2000] 1 FLR 785. The discretion to refuse recognition on public policy grounds should be exercised with great caution: *Qureshi v Qureshi* [1972] Fam 173 at 201, [1971] 1 All ER 325 at 346; *Varanand v Varanand* (1964) 108 Sol Jo 693; *Chaudhary v Chaudhary* [1985] Fam 19, [1984] 3 All ER 1017, CA; *Eroglu v Eroglu* [1994] 2 FCR 525, [1994] 2 FLR 287. See also *Re Meyer* [1971] P 298, [1971] 1 All ER 378 (duress; racial discrimination); *Middleton v Middleton* [1967] P 62, [1966] 1 All ER 168 (false evidence); *Vardy v Smith (otherwise Vardy)* (1932) 48 TLR 661 (affd 49 TLR 36, CA) (want of authority by legal representatives); *Pemberton v Hughes* [1899] 1 Ch 781, CA (procedural defects); *Hornett v Hornett* [1971] P 255, [1971] 1 All ER 98 (resumption of cohabitation after decree); *Kendall v Kendall* [1977] Fam 208, [1977] 3 All ER 471 (wife deceived into signing petition for unwanted divorce containing false statements). For nullity of marriage cases see eg *Mitford v Mitford and von Kuhlmann* [1923] P 130 at 137, 141-142; *Salvesen (or von Lorange) v Administrator of Austrian Property* [1927] AC 641, HL; *Merker v Merker* [1963] P 283, [1962] 3 All ER 928; *Gray (otherwise Formosa) v Formosa* [1963] P 259, [1962] 3 All ER 419, CA; *Lepre v Lepre* [1965] P 52, [1963] 2 All ER 49. In many of these cases, the reasons advanced for denying recognition (such as fraud or want of natural justice) are unavailable under the Family Law Act 1986 but the facts might attract the public policy ground. See, however, *Eroglu v Eroglu* supra; *B v B (Divorce: Northern Cyprus)* [2001] 3 FCR 331.

20 Family Law Act 1986 s 51(5). Cf *Sabbagh v Sabbagh* [1985] FLR 29. As to foreign custody orders see para 281 post; and as to maintenance orders see paras 292-335 post. In England, under the Children Act 1989, the term 'parental responsibility' is used in preference to the term 'custody': see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 133 et seq.

UPDATE

259 Grounds for refusing recognition of divorces etc

TEXT AND NOTES--Provision for civil partnerships corresponding to the provision made for the recognition of foreign divorces by the Family Law Act 1986 ss 44-51 is made by the Civil Partnership Act 2004 ss 233-238 and the Civil Partnership (Supplementary Provisions relating to the Recognition of Overseas Dissolutions, Annulments or Legal Separations) (England and Wales and Northern Ireland) Regulations 2005, SI 2005/3104. See further PARA 260A.

NOTE 11--The focus of the investigation should be on the actions of the petitioner rather than whether the respondent knew about the proceedings: *Duhur-Johnson v Duhur-Johnson (A-G intervening)* [2005] 2 FLR 1042.

NOTE 19--See also *H v H (Queen's Proctor intervening) (validity of Japanese divorce)* [2006] EWHC 2989 (Fam), [2007] 2 FCR 39.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/D. RECOGNITION OF DIVORCES, ANNULMENTS AND LEGAL SEPARATIONS/(E) Effect of Foreign Decrees/260. Effect of foreign decrees.

(E) EFFECT OF FOREIGN DECREES

260. Effect of foreign decrees.

A foreign decree of divorce recognised in accordance with the principles of the Family Law Act 1986¹ has the same effect upon the status of the parties as an English² decree of divorce. The English court will, however, recognise a condition in a foreign decree imposing a prohibition on remarriage by the parties within a period which has not yet elapsed³. A prohibition on remarriage affecting the guilty party only will be regarded as penal by the English court and treated as having no effect beyond the limits of the jurisdiction of the foreign court⁴. The recognition of a foreign decree does not require the revocation of maintenance orders made by the High Court⁵ or by magistrates' courts; as in the case of an English decree, the courts have a discretion to discharge or vary an order or to continue it in its original form⁶.

A foreign decree of nullity of marriage recognised in England operates as a universally binding judgment in rem determining status⁷. The English court will give effect to the retrospective operation of the decree, if any, under the law of the country in which it was pronounced⁸, and any English proceedings for nullity of marriage must be dismissed on the ground that there is no marriage in existence to be annulled⁹.

Where the validity of a divorce or annulment¹⁰ is recognised in England (or was itself granted by a court of civil jurisdiction in England) the fact that the divorce or annulment would not be recognised elsewhere does not preclude either party to the marriage from remarrying in England or cause the remarriage of either party (wherever the remarriage takes place) to be treated as invalid in England¹¹.

1 See para 254 et seq ante.

2 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 *Warter v Warter* (1890) 15 PD 152; *Le Mesurier (otherwise Gordon) v Le Mesurier* (1930) 99 LJP 33; *Boettcher v Boettcher* (1949) 93 Sol Jo 237. As to the position under the Indian and Colonial Divorce Jurisdiction Acts (repealed) see *Buckle v Buckle (otherwise Williams)* [1956] P 181, [1955] 3 All ER 641.

4 *Scott v A-G* (1886) 11 PD 128, 50 JP 824.

5 *Wood v Wood* [1957] P 254 at 295, [1957] 2 All ER 14 at 31, CA. Cf *Pastre v Pastre* [1930] P 80.

6 *Bragg v Bragg* [1925] P 20, DC; *Mezger v Mezger* [1937] P 19, [1936] 3 All ER 130, DC; *Kirk v Kirk* [1947] 2 All ER 118, 177 LT 151, DC; *Wood v Wood* [1957] P 254 at 267, [1957] 2 All ER 14, CA.

7 *Salvesen (or von Lorang) v Administrator of Austrian Property* [1927] AC 641, HL; *Merker v Merker* [1963] P 283, [1962] 3 All ER 928.

8 *Salvesen (or von Lorang) v Administrator of Austrian Property* [1927] AC 641, HL.

9 *Turner v Thompson* (1888) 13 PD 37.

10 For the meaning of 'annulment' for this purpose see para 253 note 2 ante.

11 Family Law Act 1986 s 50. Cf *Perrini v Perrini* [1979] Fam 84, [1979] 2 All ER 323; *Lawrence v Lawrence* [1985] Fam 106, [1985] 2 All ER 733, CA.

UPDATE

260 Effect of foreign decrees

TEXT AND NOTES--Provision for civil partnerships corresponding to the provision made for the recognition of foreign divorces by the Family Law Act 1986 ss 44-51 is made by the Civil Partnership Act 2004 ss 233-238 and the Civil Partnership (Supplementary Provisions relating to the Recognition of Overseas Dissolutions, Annulments or Legal Separations) (England and Wales and Northern Ireland) Regulations 2005, SI 2005/3104. See further PARA 260A.

TEXT AND NOTE 11--Family Law Act 1986 s 50 amended: Civil Partnership Act 2004 Sch 27 para 125.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(ii) Divorce, Legal Separation and Marriage Annulment/D. RECOGNITION OF DIVORCES, ANNULMENTS AND LEGAL SEPARATIONS/(E) Effect of Foreign Decrees/260A. Civil partnership: recognition of dissolution, annulment and separation.

260A. Civil partnership: recognition of dissolution, annulment and separation.

1. Effect of dissolution, annulment or separation obtained in the United Kingdom

No dissolution or annulment¹ of a civil partnership obtained in one part of the United Kingdom² is effective in any part of the United Kingdom unless obtained from a court of civil jurisdiction³. The validity of a dissolution or annulment of a civil partnership or a legal separation of civil partners which has been obtained from a court of civil jurisdiction in one part of the United Kingdom is to be recognised throughout the United Kingdom⁴. Recognition of the validity of a dissolution, annulment or legal separation obtained from a court of civil jurisdiction in one part of the United Kingdom may be refused in any other part if the dissolution, annulment or separation was obtained at a time when it was irreconcilable with a decision determining the question of the subsistence or validity of the civil partnership (1) previously given by a court of civil jurisdiction in the other part, or (2) previously given by a court elsewhere and recognised or entitled to be recognised in the other part⁵. Recognition of the validity of a dissolution or legal separation obtained from a court of civil jurisdiction in one part of the United Kingdom may be refused in any other part if the dissolution or separation was obtained at a time when, according to the law of the other part, there was no subsisting civil partnership⁶.

1 'Annulment' includes any order annulling a civil partnership, however expressed: Civil Partnership Act 2004 s 237(5).

2 'Part of the United Kingdom' means England and Wales, Scotland or Northern Ireland: *ibid* s 237(5).

3 *Ibid* s 233(1).

4 *Ibid* s 233(2). Section 233(2) is subject to s 233(3) and (4): s 233(2).

5 *Ibid* s 233(3).

6 *Ibid* s 233(4).

2. Recognition in the United Kingdom of overseas dissolution, annulment or separation

The validity of an overseas dissolution, annulment¹ or legal separation is to be recognised in the United Kingdom if, and only if, it is entitled to recognition by virtue of the provisions below².

The validity of an overseas dissolution, annulment or legal separation obtained by means of proceedings³ is to be recognised if (1) the dissolution, annulment or legal separation is effective under the law of the country in which it was obtained, and (2) at the relevant date⁴ either civil partner (a) was habitually resident in the country in which the dissolution, annulment or legal separation was obtained, (b) was domiciled in that country⁵, or (c) was a national of that country⁶. The validity of an overseas dissolution, annulment or legal separation obtained otherwise than by means of proceedings is to be recognised if (i) the dissolution, annulment or legal separation is effective under the law of the country in which it was obtained, (ii) at the relevant date (A) each civil partner was domiciled in that country, or (B) either civil partner was domiciled in that country and the other was domiciled in a country under whose law the dissolution, annulment or legal separation is recognised as valid, and (iii) neither civil partner

was habitually resident in the United Kingdom throughout the period of one year immediately preceding that date⁷.

Provision is made with respect to the refusal of recognition⁸.

Supplementary provision is made⁹.

1 For the meaning of 'annulment' see PARA 260A.1.

2 Ie by virtue of the Civil Partnership Act 2004 ss 235-237 (see PARA 260A.3): s 234(1). Section 234(1) is subject to s 234(2): s 234(1). Sections 235-237 do not apply to an overseas dissolution, annulment or legal separation as regards which provision as to recognition is made by section 219 regulations: s 234(2). For the purposes of s 234(1) and (2) and ss 235-237, an overseas dissolution, annulment or legal separation is a dissolution or annulment of a civil partnership or a legal separation of civil partners which has been obtained outside the United Kingdom (whether before or after 5 December 2005 (ie whether before or after s 234 comes into force)): s 234(3). As to commencement see SI 2005/3175.

3 'Proceedings' means judicial or other proceedings: Civil Partnership Act 2004 s 237(5).

4 In ibid s 235 'the relevant date' means (1) in the case of an overseas dissolution, annulment or legal separation obtained by means of proceedings, the date of the commencement of the proceedings; (2) in the case of an overseas dissolution, annulment or legal separation obtained otherwise than by means of proceedings, the date on which it was obtained: s 235(3). Where in the case of an overseas annulment the relevant date fell after the death of either civil partner, any reference in s 235(1) or (2) to that date is to be read in relation to that civil partner as a reference to the date of death: s 235(4).

5 For the purposes of ibid ss 235 and 236 (see PARA 260A.3), a civil partner is to be treated as domiciled in a country if he was domiciled in that country (1) according to the law of that country in family matters, or (2) according to the law of the part of the United Kingdom in which the question of recognition arises: s 237(1). See further NOTE 9. For the meaning of 'part of the United Kingdom' see PARA 260A.1.

6 Ibid s 235(1).

7 Ibid s 235(2). See further NOTE 4.

8 See ibid s 236 and PARA 260A.3.

9 See ibid s 237.

The Lord Chancellor may by regulations make provision (1) applying ss 235 and 236 (see PARA 260A.3) and s 237(1) with modifications in relation to any country whose territories have different systems of law in force in matters of dissolution, annulment or legal separation; (2) applying ss 235 and 236 with modifications in relation to (a) an overseas dissolution, annulment or legal separation in the case of an overseas relationship (or an apparent or alleged overseas relationship); (b) any case where a civil partner is domiciled in a country or territory whose law does not recognise legal relationships between two people of the same sex; (3) with respect to recognition of the validity of an overseas dissolution, annulment or legal separation in cases where there are cross-proceedings; (4) with respect to cases where a legal separation is converted under the law of the country or territory in which it is obtained into a dissolution which is effective under the law of that country or territory; (5) with respect to proof of findings of fact made in proceedings in any country or territory outside the United Kingdom: s 237(2). The power to make regulations under s 237(2) is exercisable by statutory instrument: s 237(3). A statutory instrument containing such regulations is subject to annulment in pursuance of a resolution of either House of Parliament: s 237(4)(a). See Civil Partnership (Supplementary Provisions relating to the Recognition of Overseas Dissolutions, Annulments or Legal Separations) (England and Wales and Northern Ireland) Regulations 2005, SI 2005/3104. As to regulations under the Civil Partnership Act 2004 generally see s 258.

Nothing in Pt 5 Ch 3 (ss 219-238) is to be read as requiring the recognition of any finding of fault made in proceedings for dissolution, annulment or legal separation or of any maintenance, custody or other ancillary order made in any such proceedings: s 237(6).

3. Refusal of recognition

Recognition of the validity of an overseas dissolution, annulment¹ or legal separation may be refused in any part of the United Kingdom² if the dissolution, annulment or separation was obtained at a time when it was irreconcilable with a decision determining the question of the

subsistence or validity of the civil partnership (1) previously given by a court of civil jurisdiction in that part of the United Kingdom, or (2) previously given by a court elsewhere and recognised or entitled to be recognised in that part of the United Kingdom³. Recognition of the validity of an overseas dissolution or legal separation may be refused in any part of the United Kingdom if the dissolution or separation was obtained at a time when, according to the law of that part of the United Kingdom, there was no subsisting civil partnership⁴. Recognition of the validity of an overseas dissolution, annulment or legal separation may be refused if (a) in the case of a dissolution, annulment or legal separation obtained by means of proceedings⁵, it was obtained (i) without such steps having been taken for giving notice of the proceedings to a civil partner as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken, or (ii) without a civil partner having been given (for any reason other than lack of notice) such opportunity to take part in the proceedings as, having regard to those matters, he should reasonably have been given, or (b) in the case of a dissolution, annulment or legal separation obtained otherwise than by means of proceedings (A) there is no official⁶ document certifying that the dissolution, annulment or legal separation is effective under the law of the country in which it was obtained, or (B) where either civil partner was domiciled⁷ in another country at the relevant date⁸, there is no official document certifying that the dissolution, annulment or legal separation is recognised as valid under the law of that other country, or (c) in either case, recognition of the dissolution, annulment or legal separation would be manifestly contrary to public policy⁹.

Supplementary provision is made¹⁰.

1 For the meaning of 'annulment' see PARA 260A.1.

2 For the meaning of 'part of the United Kingdom' see PARA 260A.1.

3 Civil Partnership Act 2004 s 236(1).

4 Ibid s 236(2).

5 For the meaning of 'proceedings' see PARA 260A.2.

6 In the Civil Partnership Act 2004 s 236 'official', in relation to a document certifying that a dissolution, annulment or legal separation is effective, or is recognised as valid, under the law of any country, means issued by a person or body appointed or recognised for the purpose under that law: s 236(4).

7 As to when a civil partner is to be treated as domiciled in a country see PARA 260A.2.

8 In the Civil Partnership Act 2004 s 236 'the relevant date' has the same meaning as in s 235 (see PARA 260A.2): s 236(4).

9 Ibid s 236(3).

10 See ibid s 237; and PARA 260A.2.

4. Non-recognition elsewhere of dissolution or annulment

These provisions¹ apply where, in any part of the United Kingdom² (1) a dissolution or annulment³ of a civil partnership has been granted by a court of civil jurisdiction, or (2) the validity of a dissolution or annulment of a civil partnership is recognised by virtue of Chapter 3 of Part 5 of the Civil Partnership Act 2004⁴. The fact that the dissolution or annulment would not be recognised outside the United Kingdom does not (a) preclude either party from forming a subsequent civil partnership or marriage in that part of the United Kingdom, or (b) cause the subsequent civil partnership or marriage of either party (wherever it takes place) to be treated as invalid in that part⁵.

1 I.e the Civil Partnership Act 2004 s 238.

- 2 For the meaning of 'part of the United Kingdom' see PARA 260A.1.
- 3 For the meaning of 'annulment' see PARA 260A.1.
- 4 Ie the Civil Partnership Act 2004 ss 219-238: s 238(1).
- 5 Ibid s 238(2).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(iii) Presumption of Death and Dissolution of Marriage/261. Jurisdiction.

(iii) Presumption of Death and Dissolution of Marriage

261. Jurisdiction.

The English court¹ has jurisdiction to entertain proceedings for death to be presumed and a marriage to be dissolved if, and only if, the petitioner is domiciled in England on the date when the proceedings are begun, or was habitually resident² in England throughout the period of one year ending with that date³.

1 For the meaning of 'court' see para 242 note 3 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 As to the meaning of 'habitually resident' see *Kapur v Kapur* [1984] FLR 920; and paras 59-61 ante.

3 Domicile and Matrimonial Proceedings Act 1973 s 5(4).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(iii) Presumption of Death and Dissolution of Marriage/262. Choice of law.

262. Choice of law.

Whenever it exercises jurisdiction in a case relating to the presumption of death and dissolution of marriage¹, the English court will apply English domestic law².

1 See para 261 ante.

2 See para 244 note 1 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(iii) Presumption of Death and Dissolution of Marriage/263. Recognition of foreign decrees.

263. Recognition of foreign decrees.

A decree of presumption of death and dissolution of marriage, granted in circumstances in which the relationship between the parties and the country concerned was such that it corresponded to the circumstances in which the English¹ court would have jurisdiction², will be recognised in England³. It would seem that the English court will not necessarily recognise a foreign decree of presumption of death which has no consequential effects in the law of the foreign country where the decree was granted⁴.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See para 261 ante.

3 *Szemik v Gryla (otherwise Szemik) and Gryla* (1965) 109 Sol Jo 175.

4 Cf *Re Schulhof's Goods, Re Wolf's Goods* [1948] P 66, [1947] 2 All ER 841 (decree which did not vest property of deceased and was not linked with a vesting order). See also *Re Spenceley's Goods* [1892] P 255; *Re Dowd's Goods* [1948] P 256, [1948] LJR 1887; *Re Schulhof's Goods, Re Wolf's Goods* supra at 66-67, and 841-842.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(2) MATRIMONIAL CAUSES/(iv) Declarations as to Status/264. Declarations.

(iv) Declarations as to Status

264. Declarations.

The court¹ has power to make various declarations in relation to a marriage², namely:

- 241 (1) that the marriage was at its inception a valid marriage³;
- 242 (2) that the marriage subsisted on a date specified in the application⁴;
- 243 (3) that the marriage did not subsist on a date so specified⁵;
- 244 (4) that the validity of a divorce, annulment or legal separation obtained in any country outside England⁶ in respect of the marriage is entitled to recognition⁷;
- 245 (5) that the validity of a divorce, annulment or legal separation so obtained in respect of the marriage is not entitled to recognition⁸.

Where, on an application to a court for such a declaration, the truth of the proposition to be declared is proved to the satisfaction of the court, the court must make that declaration unless to do so would manifestly be contrary to public policy⁹. A declaration binds the Crown and all other persons¹⁰.

A court has jurisdiction to entertain an application¹¹ for such a declaration if, and only if, either of the parties to the marriage to which the application relates:

- 246 (a) is domiciled in England on the date of the application; or
- 247 (b) has been habitually resident¹² in England throughout the period of one year ending with that date; or
- 248 (c) died before that date and either:
19
26. (i) was at death domiciled in England; or
27. (ii) had been habitually resident in England throughout the period of one year ending with the date of death¹³.
20

No court may make a declaration that a marriage was at its inception void¹⁴.

Any declaration under these provisions, and any application for such a declaration, must be in the form prescribed by rules of court¹⁵.

The court may direct that the whole or any part of proceedings is to be heard in camera, and an application for such a direction must be heard in camera unless the court otherwise directs¹⁶.

1 le the High Court or a county court: Family Law Act 1986 s 55(1) (amended by the Child Support, Pensions and Social Security Act 2000 s 83(5), Sch 8 paras 3, 4(a)).

2 The declaration sought should be specified in the application: Family Law Act 1986 s 55(1). On dismissing an application, a court has no power to make any declaration for which an application has not been made: s 58(3) (amended by the Child Support, Pensions and Social Security Act 2000 s 83(5), Sch 8 paras 3, 7(b)). No declaration which may be applied for under the Family Law Act 1986 Pt III (ss 55-63) may be made otherwise than under that Part by any court: s 58(4). Thus the former power to make declarations under the inherent power of the High Court is excluded.

The right to petition for jactitation of marriage (ie a declaration by the court that the respondent should be restrained from boasting that he or she is married to the petitioner when that is not true) was abolished by s 61.

No proceedings under Pt III affect any final judgment or decree already pronounced or made by any court of competent jurisdiction: s 60(3).

3 Ibid s 55(1)(a).

4 Ibid s 55(1)(b).

5 Ibid s 55(1)(c).

6 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

7 Family Law Act 1986 s 55(1)(d).

8 Ibid s 55(1)(e).

9 Ibid s 58(1) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 8 paras 3, 7(a)).

10 Family Law Act 1986 s 58(2). At any stage of the proceedings, the court may of its own motion, or on the application of any party, direct that all necessary papers in the matter be sent to the Attorney General: s 59(1) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 8 paras 3, 8). The Attorney General, whether or not he is sent papers, may intervene in the proceedings in such manner as he thinks necessary or expedient, and argue before the court any question in relation to the application which the court considers it necessary to have fully argued: s 59(2) (as so amended). Where the Attorney General incurs any costs in connection with any application for a declaration, the court may make such order as it considers just as to the payment of those costs by parties to the proceedings: s 59(3) (as so amended).

11 Where an application is made to a court by any person other than a party to the marriage to which the application relates, the court must refuse to hear the application if it considers that the applicant does not have a sufficient interest in the determination of that application: ibid s 55(3) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 8 paras 3, 4(b)).

12 As to the meaning of 'habitually resident' see *Kapur v Kapur* [1984] FLR 920; and paras 59-61 ante.

13 Family Law Act 1986 s 55(2).

14 Ibid s 58(5) (amended by the Child Support, Pensions and Social Security Act 2000 ss 83(1), (3), 85, Sch 9 Pt IX). However, nothing in the Family Law Act 1986 affects the power of any court to grant a decree of nullity of marriage: s 58(6).

15 Ibid s 60(1). Rules of court may make provision as to the information required to be given by any applicant for a declaration under Pt III, as to the persons who are to be parties to proceedings on an application under Pt III, and requiring notice of an application under Pt III to be served on the Attorney General and on persons who may be affected by any declaration applied for: s 60(2) (amended by the Family Law Reform Act 1987 s 33(1), Sch 2 para 96). As to the rules made for this purpose see the Family Proceedings Rules 1991, SI 1991/1247.

16 Family Law Act 1986 s 60(4).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(i) Jurisdiction relating to Parental Responsibility/A. JURISDICTION UNDER THE 'BRUSSELS II' REGULATION/265. Jurisdiction.

(3) ORDERS AS TO CHILDREN

(i) Jurisdiction relating to Parental Responsibility

A. JURISDICTION UNDER THE 'BRUSSELS II' REGULATION

265. Jurisdiction.

Where the English court¹ is exercising jurisdiction by virtue of the 'Brussels II' Regulation² on an application for divorce, legal separation or marriage annulment, it has jurisdiction in a matter relating to parental responsibility³ over a child of both spouses where:

- 249 (1) the child is habitually resident in England⁴; or
- 250 (2) the child is not habitually resident in England but is habitually resident in one of the other member states, if at least one of the spouses has parental responsibility in relation to the child and both spouses have accepted the jurisdiction of the courts as being in the best interests of the child⁵.

The jurisdiction conferred by these provisions ceases as soon as:

- 251 (a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final⁶; or
- 252 (b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in head (a) above, a judgment in these proceedings has become final⁷; or
- 253 (c) the proceedings referred to in heads (a) and (b) above have come to an end for another reason⁸.

Where jurisdiction is derived from the 'Brussels II' Regulation and proceedings involving the same parties are brought in the United Kingdom and another member state (whether involving the same cause of action or not), one of the courts must decline jurisdiction⁹.

¹ For the meaning of 'court' see para 242 note 3 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

² ie under the 'Brussels II' Regulation art 2. As to the 'Brussels II' Regulation see para 242 note 4 ante. Under the Regulation as it stands, all jurisdiction with regard to matters of parental responsibility derives from the jurisdiction in the main proceedings for divorce, legal separation or marriage annulment: see para 242 ante. However, at the date at which this volume states the law, proposals are in hand to revise the 'Brussels II' Regulation so that it includes all matters relating to all children regardless of the context in which those matters arise, and in particular:

- 103 (1) the scope of any new Regulation will be extended to include the children of unmarried as well as married couples;
- 104 (2) jurisdiction rules will be extended to include disputes over child contact and residence;
- 105 (3) the child will be allowed to participate in decisions relating to contact and residence;

106 (4) the issue of securing the safe return of the child following a period of contact abroad will be addressed; and

107 (5) procedural amendments will be made to the regime which regulates cross-national maintenance agreements (currently regulated by the 'Brussels I' Regulation: see para 335 post).

As to the proposals for revision see further para 65 note 1 ante.

3 'Parental responsibility' is not defined in the 'Brussels II' Regulation. The exercise of jurisdiction within the meaning of these provisions is expressed to be subject to conformity with the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33) and in particular art 3 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 808) and art 16 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 815): 'Brussels II' Regulation art 4. However, the Regulation takes precedence, in relations between member states, over the Convention on the Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Hague, 19 October 1996), provided that the child concerned is habitually resident in a member state, and in so far as the Convention concerns matters governed by the Regulation: art 37. For the meaning of 'member state' see para 242 note 4 ante.

Thus a hierarchy of international instruments is established: the Hague Convention on the Civil Aspects of International Child Abduction has priority over the 'Brussels II' Regulation where an application under the Convention is pending or imminent; the Hague Convention on the Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children takes precedence over EC Regulations internationally but has effect within member states only if the child is not habitually resident in a member state or if the matter is not regulated by the 'Brussels II' Regulation; and the Regulation itself takes precedence over the European Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191). See also para 281 post.

As to child abduction generally and the relevant Conventions see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 780 et seq.

4 'Brussels II' Regulation art 3 para 1. As to habitual residence see paras 59-61 ante.

5 Ibid art 3 para 2.

6 Ibid art 3 para 3(a).

7 Ibid art 3 para 3(b).

8 Ibid art 3 para 3(c).

9 See ibid art 11; and para 271 post.

UPDATE

265 Jurisdiction

NOTE 8--See *Re A (a child) (foreign contact order)*[2003] EWHC 2911 (Fam), [2004] 1 All ER 912.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(i) Jurisdiction relating to Parental Responsibility/B. JURISDICTION OTHER THAN UNDER THE 'BRUSSELS II' REGULATION/266. Introduction.

B. JURISDICTION OTHER THAN UNDER THE 'BRUSSELS II' REGULATION

266. Introduction.

A court in England has jurisdiction to make certain orders as to children¹ if, and only if, certain requirements are satisfied². The orders in question³ are:

- 254 (1) contact, residence, specific issue or prohibited steps orders made under the Children Act 1989 other than an order varying or discharging such an order⁴; and
- 255 (2) orders made in the exercise of the inherent jurisdiction of the High Court with respect to children so far as they give the care of a child to any person or provide for contact with, or the education of, a child; but excluding orders varying or revoking such an order⁵.

1 'Child' in these provisions means a person who has not attained the age of 18: Family Law Act 1986 s 7(a) (s 7 substituted by the Children Act 1989 s 108(5), Sch 13 para 67). As to the application of the Family Law Act 1986 generally see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 830 et seq. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See para 267 et seq post.

3 These orders are referred to as 'Part I orders', the reference being to the Family Law Act 1986 Pt I (ss 1-43) (as amended): s 1(1) (amended by the Children Act 1989 Sch 13 para 62). In addition to the orders mentioned in the text, 'Part I order' also includes any order which would have been a custody order by virtue of the Family Law Act 1986 s 1 (as amended) in any form in which it was in force at any time before its amendment by the Children Act 1989; and (with certain exceptions) excludes any order which would have been excluded from being a custody order by virtue of that provision in any such form: Family Law Act 1986 s 1(3) (substituted by the Children Act 1989 Sch 13 para 63(3)). As to the duration and variation of orders see the Family Law Act 1986 s 6 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 836. In England, under the Children Act 1989, the term 'parental responsibility' is used in preference to the term 'custody': see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 133 et seq.

As from a day to be appointed, two further orders will be specified as 'Part I orders', namely:

- 108 (1) a special guardianship order made by a court in England under the Children Act 1989 (Family Law Act 1986 s 1(1)(aa) (prospectively added by the Adoption and Children Act 2002 s 139, Sch 3 paras 46, 47)); and
- 109 (2) an order made under the Adoption and Children Act 2002 s 26 (not yet in force), other than an order varying or revoking such an order (Family Law Act 1986 s 1(1)(ab) (prospectively added by the Adoption and Children Act 2002 Sch 3 paras 46, 47)).

At the date at which this volume states the law, no such day has been appointed.

4 Ie 'section 8 orders' made under the Children Act 1989 s 8 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 247 et seq): Family Law Act 1986 s 1(1)(a) (substituted by the Children Act 1989 Sch 13 para 63(1)(a)).

5 Family Law Act 1986 s 1(1)(d) (substituted by the Children Act 1989 Sch 13 para 63(1)(b)). As to the exercise of the High Court's inherent jurisdiction see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 834.

UPDATE

266 Introduction

NOTE 3--Adoption and Children Act 2002 s 26, Sch 3 paras 46, 47 now in force: SI 2005/2213.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(i) Jurisdiction relating to Parental Responsibility/B. JURISDICTION OTHER THAN UNDER THE 'BRUSSELS II' REGULATION/267. Matrimonial proceedings.

267. Matrimonial proceedings.

A court in England has jurisdiction to make an order under the Children Act 1989¹ with respect to a child in or in connection with matrimonial proceedings² if, and only if³:

- 256 (1) the child concerned is a child of both parties to the matrimonial proceedings and the court has jurisdiction to entertain those proceedings by virtue of the 'Brussels II' Regulation⁴; or
- 257 (2) the matrimonial proceedings are proceedings in respect of the marriage of the parents of the child concerned⁵; and:
- 21
- 28. (a) the proceedings are for divorce or nullity of marriage, and are continuing⁶; or
- 29. (b) the proceedings are for judicial separation, and are continuing, and the jurisdiction of the court is not excluded by virtue of the fact that, after the grant of a decree of judicial separation, on the relevant date⁷ proceedings for divorce or nullity in respect of the marriage are continuing in Scotland, Northern Ireland or a specified dependent territory⁸; or
- 30. (c) the proceedings have been dismissed after the beginning of the trial but the order in respect of the child is being made forthwith, or the application for the order was made on or before the dismissal⁹.
- 22

Where a court has jurisdiction to make an order in, or in connection with, matrimonial proceedings, but considers that it would be more appropriate for the matters relating to the child to be determined outside England, the court may direct that (for so long as the order making that direction remains in force) no such order may be made by any court in or in connection with those proceedings¹⁰.

1. I.e. a 'section 8 order': see para 266 text and note 4 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2. 'Matrimonial proceedings' means proceedings for divorce, nullity or judicial separation: Family Law Act 1986 s 7(b) (s 7 substituted by the Children Act 1989 s 108(5), Sch 13 para 67).

3. Family Law Act 1986 s 2(1). Section 2 has been prospectively amended by the Family Law Act 1996 s 66(1), Sch 8 para 37. At the date at which this volume states the law no day had been appointed for the commencement of the amending provisions. The Lord Chancellor has announced that the Family Law Act 1996 Pt II (ss 2-25) will not be implemented and the relevant provisions of that Act (which include the amendments effected by s 66, Sch 8 Pt I para 37) will be repealed without being brought into force: see 620 HL Official Report (5th series), 16 January 2001, written answers col 126.

4. Family Law Act 1986 s 2(1)(a) (substituted by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310, reg 6). As to jurisdiction under the 'Brussels II' Regulation see para 265 ante. As to the 'Brussels II' Regulation see para 242 note 4 ante. The Family Law Act 1986 s 2(1) has been prospectively amended by the Family Law Act 1996 s 66(1), Sch 8 para 37; but see note 3 supra.

5. Family Law Act 1986 ss 2(1)(b), 2A(1) (s 2(1)(b) renumbered by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310, reg 6; Family Law Act 1986 s 2A added by the Children Act 1989 Sch 13 para 64). The Family Law Act 1986 ss 2(1), 2A(1) have been prospectively amended by the Family Law Act 1996 s 66(1), Sch 8 para 37; but see note 3 supra.

6 Family Law Act 1986 s 2A(1)(a) (as added: see note 5 supra). The Family Law Act 1986 s 2A(1) has been prospectively amended by the Family Law Act 1996 s 66(1), Sch 8 para 37; but see note 3 supra.

7 The relevant date is the date on which the application (or first application, if two or more are determined together) for the order was made, or if no such application was made, the date on which the court is considering whether to make the order: Family Law Act 1986 s 7(c) (as substituted: see note 2 supra).

8 Ibid s 2A(1)(b), (2) (s 2A as added (see note 5 supra); s 2A(2) subsequently amended by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723, art 3(2), Sch 2 para 2). For these purposes, 'dependent territory' means the Isle of Man, any of the Channel Islands, and any colony: Family Law Act 1986 s 43(2). At the date at which this volume states the law, the Isle of Man had been so specified: Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723, art 3, Sch 1.

This exclusion does not apply where the court in Scotland, Northern Ireland or the dependent territory has made an order: (1) directing that no Part I order (or equivalent) be made by any court; or (2) staying the proceedings before it in respect of the issues affecting the child: see the Family Law Act 1986 s 2A(3) (as so added). An Order in Council may regulate the jurisdiction of courts in any dependent territory, or as between any dependent territory and any part of the United Kingdom, or as between any dependent territory and any other such territory, to make Part I orders, or orders corresponding to Part I orders, and the recognition and enforcement of such orders: s 43(1) (amended by the Children Act 1989 Sch 13 para 62). As to 'Part I' orders see para 266 ante. For the meaning of 'United Kingdom' see para 4 ante. The Family Law Act 1986 s 2A(1), (2), (3) has been prospectively amended by the Family Law Act 1996 s 66(1), Sch 8 para 37; but see note 3 supra.

9 Family Law Act 1986 s 2A(1)(c) (as added: see note 5 supra). The Family Law Act 1986 s 2A(1) has been prospectively amended by the Family Law Act 1996 s 66(1), Sch 8 para 37; but see note 3 supra.

10 Family Law Act 1986 s 2A(4) (as added: see note 5 supra). The Family Law Act 1986 s 2A(4) has been prospectively amended by the Family Law Act 1996 s 66(1), Sch 8 para 37; but see note 3 supra.

UPDATE

267 Matrimonial proceedings

TEXT AND NOTES 1-5--1986 Act s 2(1) substituted by the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265; and amended by the Civil Partnership (Family Proceedings and Housing Consequential Amendments) Order 2005, SI 2005/3336. SI 2001/310 reg 6 revoked: SI 2005/265.

TEXT AND NOTES 5-9--1986 Act s 2A(1) amended, s 2A(2) substituted: SI 2005/3336.

TEXT AND NOTE 10--1986 Act s 2A(4) amended: SI 2005/265.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(i) Jurisdiction relating to Parental Responsibility/B. JURISDICTION OTHER THAN UNDER THE 'BRUSSELS II' REGULATION/268. Non-matrimonial cases.

268. Non-matrimonial cases.

A court in England has jurisdiction to make an order under the Children Act 1989¹ in a non-matrimonial case² if, and only if³:

- 258 (1) on the relevant date⁴ the child⁵ concerned is habitually resident⁶ in England⁷ or is present in England and is not habitually resident in any part of the United Kingdom⁸; and
- 259 (2) in either case the jurisdiction of the court is not excluded by virtue of the fact that on the relevant date matrimonial proceedings⁹ are continuing in a court in Scotland, Northern Ireland or a specified dependent territory¹⁰ in respect of the marriage of the parents of the child concerned¹¹.

1 le a 'section 8 order': see para 266 text and note 4 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 le where the condition in the Family Law Act 1986 s 2A (as added) (see para 267 head (2) ante) is not satisfied: s 2(2) (s 2 substituted by the Children Act 1989 s 108(5), Sch 13 para 64). The Family Law Act 1986 ss 2(2), 2A have been prospectively amended by the Family Law Act 1996 s 66(1), Sch 8 para 37. At the date at which this volume states the law no day had been appointed for the commencement of the amending provisions. The Lord Chancellor has announced that the Family Law Act 1996 Pt II (ss 2-25) will not be implemented and the relevant provisions of that Act (which include the amendments effected by s 66, Sch 8 Pt I para 37) will be repealed without being brought into force: see 620 HL Official Report (5th series), 16 January 2001, written answers col 126.

3 Family Law Act 1986 ss 2(2), 3(1) (s 2 as substituted (see note 2 supra); s 3(1) amended by the Children Act 1989 Sch 13 para 62). The Family Law Act 1986 ss 2(2), 3(1) have been prospectively amended by the Family Law Act 1996 s 66(1), Sch 8 para 37; but see note 2 supra.

4 For the meaning of 'the relevant date' see para 267 note 7 ante.

5 For the meaning of 'child' see para 266 note 1 ante.

6 The term 'habitually resident' is not defined in the Family Law Act 1986 but as to its meaning see *Kapur v Kapur* [1984] FLR 920; and paras 59-61 ante.

7 Family Law Act 1986 s 3(1)(a).

8 Ibid s 3(1)(b) (amended by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723, art 3(2), Sch 2 para 3). 'Part of the United Kingdom' means 'England and Wales, Scotland or Northern Ireland: Family Law Act 1986 s 42(1). For the meaning of 'United Kingdom' see para 4 ante.

9 For the meaning of 'matrimonial proceedings' see para 267 note 2 ante.

10 For the meaning of 'dependent territories' see para 267 note 8 ante. At the date at which this volume states the law, the Isle of Man had been specified: see para 267 note 8 ante.

11 Family Law Act 1986 s 3(1), (2) (s 3(2) amended by the Children Act 1989 Sch 13 para 65; and by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723, Sch 2 para 3).

This exclusion does not apply where the court in Scotland, Northern Ireland or the dependent territory has made an order: (1) directing that no Part I order (or equivalent) be made; or (2) staying the proceedings before it in respect of the issues affecting the children: see the Family Law Act 1986 s 3(3) (amended by the Children Act 1989 Sch 13 para 62; and the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723, Sch 2 para 3). As to 'Part I' orders see para 266 ante.

UPDATE

268 Non-matrimonial cases

TEXT AND NOTES--1986 Act s 2(2) substituted, ss 2A, 3(1) amended: European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265.

TEXT AND NOTE 11--1986 Act s 3(2) further amended: SI 2005/3336.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(i) Jurisdiction relating to Parental Responsibility/B. JURISDICTION OTHER THAN UNDER THE 'BRUSSELS II' REGULATION/269. Inherent jurisdiction.

269. Inherent jurisdiction.

A court in England¹ has jurisdiction to make orders in the exercise of the inherent jurisdiction of the High Court with respect to children² if, and only if, certain requirements as to residence or presence³ are met or the child concerned is present in England on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection⁴.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 Ie such orders as are mentioned in para 266 head (2) ante. For the meaning of 'child' see para 266 note 1 ante.

3 Ie the requirements of the Family Law Act 1986 s 3 (as amended): see para 268 ante. The Family Law Act 1986 s 3 has been prospectively amended by the Family Law Act 1996 s 66(1), Sch 8 para 37. At the date at which this volume states the law no day had been appointed for the commencement of the amending provisions. The Lord Chancellor has announced that the Family Law Act 1996 Pt II (ss 2-25) will not be implemented and the relevant provisions of that Act (which include the amendments effected by s 66, Sch 8 Pt I para 37) will be repealed without being brought into force: see 620 HL Official Report (5th series), 16 January 2001, written answers col 126.

4 Family Law Act 1986 s 2(3) (substituted by the Children Act 1989 s 108(5), Sch 13 para 64). In relation to cases under the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 799 et seq), the inherent jurisdiction of the High Court includes jurisdiction to make an order mirroring a foreign court's order for contact arrangements: *Re P (A Child) (Mirror Orders)* [2000] 1 FCR 350.

UPDATE

269 Inherent jurisdiction

TEXT AND NOTES--1986 Act s 2(3) substituted: European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(ii) Stay of Proceedings relating to Parental Responsibility/A. STAY OF PROCEEDINGS UNDER THE 'BRUSSELS II' REGULATION/270. Mandatory stay of proceedings: examination as to admissibility.

(ii) Stay of Proceedings relating to Parental Responsibility

A. STAY OF PROCEEDINGS UNDER THE 'BRUSSELS II' REGULATION

270. Mandatory stay of proceedings: examination as to admissibility.

Where proceedings are initiated in an English court¹ under the 'Brussels II' Regulation², and the respondent is habitually resident in another Member state³ and does not enter an appearance, the court must stay the proceedings so long as it is not shown that the respondent has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end⁴.

1 For the meaning of 'court' see para 242 note 3 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 For the meaning of 'the 'Brussels II' Regulation' see para 242 note 4 ante.

3 For the meaning of 'member state' see para 242 note 4 ante.

4 'Brussels II' Regulation art 10 para 1. Where the document instituting the proceedings or an equivalent document has to be transmitted from one member state to another pursuant to the Service Regulation, art 19 of that Regulation displaces the provisions of the 'Brussels II' Regulation art 10 para 1: art 10 para 2. Where the Service Regulation does not apply and a member state is bound to serve judicial and extra-judicial documents in accordance with its international obligations see the 'Brussels II' Regulation art 10 para 3. For the meaning of 'the Service Regulation' see para 120 note 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(ii) Stay of Proceedings relating to Parental Responsibility/A. STAY OF PROCEEDINGS UNDER THE 'BRUSSELS II' REGULATION/271. *Lis alibi pendens*.

271. *Lis alibi pendens*.

Where jurisdiction lies with an English court¹ under the 'Brussels II' Regulation² and:

- 260 (1) proceedings involving the same cause of action and between the same parties are brought before the courts of another member state as well as in England³; or
- 261 (2) proceedings for divorce, legal separation or marriage annulment not involving the same cause of action and between the same parties are brought before the courts of another member state as well as in England⁴,

the court second seised (whichever it is) must of its own motion stay its proceedings until such time as the jurisdiction of the court first seised (whichever it is) is established⁵. Where the jurisdiction of the court first seised is established, the court second seised must decline jurisdiction in favour of that court; and the party who brought the relevant action before the court second seised may then bring that action before the court first seised⁶.

¹ For the meaning of 'court' see para 242 note 3 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

² As to jurisdiction under the 'Brussels II' Regulation see para 242 ante. As to the 'Brussels II' Regulation see para 242 note 4 ante.

³ 'Brussels II' Regulation art 11 para 1. For the meaning of 'member state' see para 242 note 4 ante.

⁴ Ibid art 11 para 2. These are so-called 'dependent actions' involving the same parties: see the heading to Section 3 (arts 11-12) of the 'Brussels II' Regulation.

⁵ Ibid art 11 paras 1, 2. For these purposes, a court is deemed to be seised:

- 110 (1) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent (art 11 para 4(a)); or
- 111 (2) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court (art 11 para 4(b)).

⁶ Ibid art 11 para 3.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(ii) Stay of Proceedings relating to Parental Responsibility/B. STAY OF PROCEEDINGS OTHER THAN UNDER THE 'BRUSSELS II' REGULATION/272. Power of court to refuse application or stay proceedings.

B. STAY OF PROCEEDINGS OTHER THAN UNDER THE 'BRUSSELS II' REGULATION

272. Power of court to refuse application or stay proceedings.

A court in England which has jurisdiction to make an order¹ may refuse an application for the order in any case where the matter in question has already been determined in proceedings outside England². Where, at any stage of the proceedings on an application made to a court in England for such an order, or for the variation of such an order, other than proceedings governed by the 'Brussels II' Regulation³, it appears to the court:

- 262 (1) that proceedings with respect to the matters to which the application relates are continuing outside England; or
- 263 (2) that it would be more appropriate for those matters to be determined in proceedings to be taken outside England,

the court may stay the proceedings on the application⁴.

1 I.e. a 'Part I order': see para 266 text and note 3 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 Family Law Act 1986 s 5(1) (amended by the Children Act 1989 s 108(5), Sch 13 para 62).

3 As to the 'Brussels II' Regulation see para 242 note 4 ante.

4 Family Law Act 1986 s 5(2) (amended by the Children Act 1989 Sch 13 para 62; and the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310, reg 7). This is without prejudice to any other power the court may have to grant or remove a stay: Family Law Act 1986 s 5(4). The court may remove a stay granted under s 5(2) (as amended) if it appears to the court that there has been unreasonable delay in the taking or prosecution of the other proceedings referred to, or that those proceedings are stayed, sisted or concluded: s 5(3). In determining the most appropriate forum the child's welfare is an important, but not paramount, consideration: *Re S (A Minor) (Contact: Jurisdiction)* [1995] 2 FCR 162, sub nom *Re S (Residence Order: Forum Conveniens)* [1995] 1 FLR 314. See also *Re S (A Minor) (Stay of Proceedings)* [1994] 1 FCR 577, [1993] 2 FLR 912, [1993] Fam Law 674, CA; *M v B (Child: Jurisdiction)* [1994] 2 FCR 899, sub nom *M v B (Residence: Forum Conveniens)* [1994] 2 FLR 819; *T v T (Forum Conveniens)* [1995] 1 FCR 478, [1995] 2 FLR 660; *Re K (Abduction: Consent: Forum Conveniens)* [1995] 3 FCR 697, [1995] 2 FLR 211, CA; *H v H (A Minor) (No 2) (Forum Conveniens)* [1997] 1 FCR 603; *Re M (Minors) (Jurisdiction: Habitual Residence)* [1997] 2 FCR 527, sub nom *M v M (Abduction: England and Scotland)* [1997] 2 FLR 263, CA.

UPDATE

272 Power of court to refuse application or stay proceedings

TEXT AND NOTES 3, 4--1986 Act s 5(2)-(4) amended, s 5(3A) added: European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265. SI 2001/310 reg 7 revoked: SI 2005/265.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(iii) Recognition and Enforcement of Orders relating to Parental Responsibility/A. RECOGNITION AND ENFORCEMENT UNDER THE 'BRUSSELS II' REGULATION/273. Application for enforcement under the 'Brussels II' Regulation.

(iii) Recognition and Enforcement of Orders relating to Parental Responsibility

A. RECOGNITION AND ENFORCEMENT UNDER THE 'BRUSSELS II' REGULATION

273. Application for enforcement under the 'Brussels II' Regulation.

Under the 'Brussels II' Regulation¹, a judgment² on the exercise of parental responsibility in respect of a child of both parties which is given in a member state and is enforceable there is enforceable in England when, on the application of any interested party, it has been registered for enforcement there³. If the judgment has been given for several matters, but enforcement cannot be authorised for all of them, enforcement may be authorised for one or more of them⁴.

An application for a declaration of enforceability in England is made to the High Court⁵. An application is made without notice to the party against whom enforcement is sought⁶, and must be supported by written evidence⁷. The procedure for making the application is governed by the law of the member state in which enforcement is sought⁸.

The jurisdiction of the court of the member state in which enforcement is sought is determined by reference to the place of the habitual residence⁹ of the person against whom enforcement is sought or by reference to the habitual residence of any child to whom the application relates¹⁰. Where neither of these places can be found in the member state where enforcement is sought, the jurisdiction of the court is determined by reference to the place of enforcement¹¹.

1 As to the 'Brussels II' Regulation see para 242 note 4 ante.

2 For the meaning of 'judgment' in this context see para 251 note 2 ante. See also the Family Proceedings Rules 1991, SI 1991/1247, r 7.40 (added by SI 2001/821). The procedure relating to enforcement applies equally to authentic instruments and court settlements (see para 251 note 4 ante) as it does to judgments, with minor modifications: see the Family Proceedings Rules 1991, SI 1991/1247, r 7.49.

3 'Brussels II' Regulation art 21 paras 1, 2. For the meaning of 'member state' see para 242 note 4 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. Note that such a judgment given in a Regulation state other than the United Kingdom is enforceable in another Regulation state once served when, on the application of any interested party, it has been declared enforceable there: art 21 para 1. For the meaning of 'Regulation state' see para 65 note 6 ante.

4 Ibid art 29 para 1. An applicant may request partial enforcement of a judgment: art 29 para 2.

5 Ibid art 22 para 1, Annex I. Every application to the High Court under the 'Brussels II' Regulation, other than an application for a certified copy of a judgment, must be filed with the principal registry: Family Proceedings Rules 1991, SI 1991/1247, r 7.41 (added by SI 2001/821).

6 'Brussels II' Regulation art 24, para 1. See the Family Proceedings Rules 1991, SI 1991/1247, r 7.42 (added by SI 2001/821).

7 'Brussels II' Regulation art 23 para 3. The party applying for a declaration of enforceability must produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity together with a certificate issued by the competent court or authority: art 32 para 1, art 33. As to the procedure to be followed in England when applying for a certified copy of a judgment see the Family Proceedings Rules 1991, SI 1991/1247, r 7.49. In the case of a judgment given in default, the applicant must produce, in addition, the

original or certified true copy of the document which establishes that the defaulting party was served with the document instituting the proceedings or with an equivalent document or any document indicating that the defendant has accepted the judgment unequivocally: 'Brussels II' Regulation art 32 para 2. The court may, if the prescribed documents supporting the judgment are not produced, specify a time for production, accept equivalent documents or, if it considers that it already has sufficient information before it, dispense with their production, and may also require a translation of documents: art 34. No other formality may be required in respect of documents: art 35. As to the requirements in England see the Family Proceedings Rules 1991, SI 1991/1247, r 7.43 (added by SI 2001/821).

8 'Brussels II' Regulation art 23, para 1. Thus the *lex fori* applies. For the meaning of '*lex fori*' see para 11 ante. The applicant must give an address for service within the area of jurisdiction of the court applied to unless the law of the member state in which enforcement is sought does not provide for the furnishing of such an address, in which case the applicant must appoint a litigation friend: art 23 para 2. The documents referred to in arts 32 and 33 (see note 7 supra) must be attached to the application: art 23 para 3. See the Family Proceedings Rules 1991, SI 1991/1247, r 7.43 (added by SI 2001/821).

9 As to habitual residence see paras 59-61 ante.

10 'Brussels II' Regulation art 22 para 2.

11 Ibid art 22 para 2.

UPDATE

273-280 Recognition and Enforcement under the 'Brussels II' Regulation

For further provision under the 'Brussels II' Regulation (as replaced: see PARA 242) relating to the service of certificates concerning rights of access and certificates concerning the return of the child, and applications for the transfer of proceedings to a court of another member state, see the Family Proceedings Rules 1991, SI 1991/1247, rr 7.51-7.55 (added by SI 2005/264).

273 Application for enforcement under the 'Brussels II' Regulation

NOTES 2, 6--SI 1991/1247 rr 7.40, 7.42 amended: SI 2005/264.

NOTES 2, 7--SI 1991/1247 r 7.49 amended: SI 2005/264.

NOTES 7, 8--SI 1991/1247 r 7.43 amended: SI 2005/264.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(iii) Recognition and Enforcement of Orders relating to Parental Responsibility/A. RECOGNITION AND ENFORCEMENT UNDER THE 'BRUSSELS II' REGULATION/274. The decision of the court.

274. The decision of the court.

Where an application for the registration of a judgment relating to the parental responsibility of spouses given on the occasion of proceedings for a divorce, legal separation or marriage annulment¹ has been made under the 'Brussels II' Regulation², the court³ must give its decision without delay⁴.

The application may be refused only for one of the reasons specified by the Regulation as a reason for the non-recognition of a judgment within its scope⁵. Such a judgment will not be recognised:

- 264 (1) if such recognition is manifestly contrary to the public policy of the member state in which recognition is sought, taking into account the best interests of the child⁶; or
- 265 (2) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the member state in which recognition is sought⁷; or
- 266 (3) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally⁸; or
- 267 (4) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard⁹; or
- 268 (5) if it is irreconcilable with a later judgment relating to parental responsibility given in the member state in which recognition is sought¹⁰; or
- 269 (6) if it is irreconcilable with a later judgment relating to parental responsibility given in another member state or in the non-member state of the habitual residence¹¹ of the child provided that the later judgment fulfils the conditions necessary for its recognition in the member state in which recognition is sought¹².

Under no circumstances may a judgment be reviewed as to its substance¹³.

If the court makes an order for registration, notice of registration must be served on the other party¹⁴, who has a right of appeal¹⁵.

1 For the meaning of 'judgment' for these purposes see para 273 note 2 ante.

2 See para 273 ante. As to the 'Brussels II' Regulation see para 242 note 4 ante.

3 For the meaning of 'court' see para 242 note 3 ante.

4 'Brussels II' Regulation art 24 para 1.

5 Ibid art 24 para 2.

6 Ibid art 15 para 2(a). The test of public policy may not be applied to the rules relating to jurisdiction set out in the 'Brussels II' Regulation (see arts 2-8; and paras 242-243, 265 ante), so that the jurisdiction of the court of

the member state of origin may not be reviewed: art 17. Nor may a judgment, under any circumstances, be reviewed as to its substance (art 19) or refused recognition because the law of the member state in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts (art 18). However, a court may, on the basis of an agreement on the recognition and enforcement of judgments, not recognise a judgment given in another member state where the judgment could not be founded on the grounds of jurisdiction provided for (ie arts 2-7) (see paras 242, 265 ante) and the alternative grounds applied (ie art 8) (see para 243 ante): art 16. For the meaning of 'member state' see para 242 note 4 ante.

7 Ibid art 15 para 2(b).

8 Ibid art 15 para 2(c).

9 Ibid art 15 para 2(d).

10 Ibid art 15 para 2(e).

11 As to habitual residence see paras 59-61 ante.

12 'Brussels II' Regulation art 15 para 2(f).

13 Ibid art 24 para 3.

14 Ibid art 25. In England, notice of registration is served on the person against whom judgment was given by delivering it to him personally or by sending it to him at his usual or last known address or place of business or in such other manner as the court may direct: Family Proceedings Rules 1991, SI 1991/1247, r 7.46(1) (r 7.46 added by SI 2001/821). Permission is not required to serve such a notice out of the jurisdiction: Family Proceedings Rules 1991, SI 1991/1247, r 7.46(2) (as so added). The procedure for service out is governed by r 10.6. As to the information that is required to be stated in a notice of the registration see r 7.46(3) (as so added). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Note that the language of the Family Proceedings Rules 1991, SI 1991/1247, clarifies the possible confusion caused by the 'Brussels II' Regulation requiring the decision given on the application to be brought 'to the notice of the applicant': see, in relation to analogous wording used in the Brussels and Lugano Conventions, para 192 note 23 ante.

15 See the 'Brussels II' Regulation art 26; and para 275 post. In England, an order giving permission to register a judgment under art 21 para 2 (see para 273 ante) must be drawn up by the court, and it must state the period within which an appeal may be made against the order for registration: Family Proceedings Rules 1991, SI 1991/1247, r 7.44(1), (2) (r 7.44 added by SI 2001/821). Such an order must also contain a notification that the court will not enforce the judgment until after the expiration of the period for appeal: Family Proceedings Rules 1991, SI 1991/1247, r 7.44(2) (as so added). However, such a notification does not prevent any application for protective measures under the 'Brussels II' Regulation art 12 (see para 242 text and notes 15-16 ante) pending final determination of any issue relating to enforcement of the judgment: Family Proceedings Rules 1991, SI 1991/1247, r 7.44(3) (as so added). A register of the judgments ordered to be registered in this way must be kept in the principal registry by the proper officer: r 7.45 (added by SI 2001/821). In relation to the principal registry, 'proper officer' means the family proceedings department manager, or other officer of the court or registry acting on his behalf in accordance with directions given by the Lord Chancellor: Family Proceedings Rules 1991, SI 1991/1247, r 1.2(1) (amended by SI 1997/1056).

UPDATE

273-280 Recognition and Enforcement under the 'Brussels II' Regulation

For further provision under the 'Brussels II' Regulation (as replaced: see PARA 242) relating to the service of certificates concerning rights of access and certificates concerning the return of the child, and applications for the transfer of proceedings to a court of another member state, see the Family Proceedings Rules 1991, SI 1991/1247, rr 7.51-7.55 (added by SI 2005/264).

274 The decision of the court

NOTES 14, 15--SI 1991/1247 rr 7.44(1), (3), 7.45, 7.46 amended: SI 2005/264.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(iii) Recognition and Enforcement of Orders relating to Parental Responsibility/A. RECOGNITION AND ENFORCEMENT UNDER THE 'BRUSSELS II' REGULATION/275. Appeal against the enforcement decision.

275. Appeal against the enforcement decision.

The decision on the application for a declaration of enforceability¹ may be appealed against by either party². In England, the appeal is lodged with the High Court³.

If the appeal is brought by the applicant for a declaration of enforceability, the party against whom enforcement is sought is summoned to appear before the appellate court⁴.

An appeal against a declaration of enforceability must be lodged within one month of its service (or two months if the appellant is not habitually resident in the United Kingdom)⁵.

¹ See para 274 ante.

² 'Brussels II' Regulation art 26 para 1. As to the 'Brussels II' Regulation see para 242 note 4 ante.

³ Ibid art 26 para 2. The appeal must be dealt with in accordance with the rules governing procedure in adversarial matters: art 26 para 3. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

⁴ Ibid art 26 para 4. If the person summoned fails to appear, proceedings must be stayed in accordance with art 10 (see para 270 ante): see art 26 para 4.

⁵ Ibid art 26 para 5. No extension of time may be granted on account of distance: art 26 para 5. For the meaning of 'United Kingdom' see para 4 ante.

UPDATE

273-280 Recognition and Enforcement under the 'Brussels II' Regulation

For further provision under the 'Brussels II' Regulation (as replaced: see PARA 242) relating to the service of certificates concerning rights of access and certificates concerning the return of the child, and applications for the transfer of proceedings to a court of another member state, see the Family Proceedings Rules 1991, SI 1991/1247, rr 7.51-7.55 (added by SI 2005/264).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(iii) Recognition and Enforcement of Orders relating to Parental Responsibility/A. RECOGNITION AND ENFORCEMENT UNDER THE 'BRUSSELS II' REGULATION/276. Further appeal.

276. Further appeal.

The judgment¹ given on appeal against an enforcement decision² may be contested by the unsuccessful party (whichever it is) only by a single further appeal on a point of law³.

1 For the meaning of 'judgment' for these purposes see para 273 note 2 ante.

2 As to enforcement decisions see para 274 ante. As to appeals against enforcement decisions see para 275 ante.

3 'Brussels II' Regulation art 27. As to the 'Brussels II' Regulation see para 242 note 4 ante.

UPDATE

273-280 Recognition and Enforcement under the 'Brussels II' Regulation

For further provision under the 'Brussels II' Regulation (as replaced: see PARA 242) relating to the service of certificates concerning rights of access and certificates concerning the return of the child, and applications for the transfer of proceedings to a court of another member state, see the Family Proceedings Rules 1991, SI 1991/1247, rr 7.51-7.55 (added by SI 2005/264).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(iii) Recognition and Enforcement of Orders relating to Parental Responsibility/A. RECOGNITION AND ENFORCEMENT UNDER THE 'BRUSSELS II' REGULATION/277. Measures pending the determination of an appeal.

277. Measures pending the determination of an appeal.

If the party against whom the enforcement of a judgment¹ is sought appeals against the order for registration under the 'Brussels II' Regulation², or the judgment on further appeal³, he is entitled to apply to the court for a stay of the proceedings on the ground that: (1) an appeal has been lodged against the judgment; or (2) the time for lodging such an appeal has not yet expired⁴.

1 For the meaning of 'judgment' for these purposes see para 273 note 2 ante.

2 In order to be enforceable, the judgment must be registered: see para 273 ante. As to enforcement decisions see para 274 ante. As to appeals against enforcement decisions see para 275 ante. As to the 'Brussels II' Regulation see para 242 note 4 ante.

3 See para 276 ante.

4 'Brussels II' Regulation art 28 para 1. In the case of head (2) in the text, the court may specify the time within which such an appeal must be lodged: art 28 para 1. Any form of appeal available in the United Kingdom is treated as an appeal for this purpose: art 28 para 2. For the meaning of 'United Kingdom' see para 4 ante.

UPDATE

273-280 Recognition and Enforcement under the 'Brussels II' Regulation

For further provision under the 'Brussels II' Regulation (as replaced: see PARA 242) relating to the service of certificates concerning rights of access and certificates concerning the return of the child, and applications for the transfer of proceedings to a court of another member state, see the Family Proceedings Rules 1991, SI 1991/1247, rr 7.51-7.55 (added by SI 2005/264).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(iii) Recognition and Enforcement of Orders relating to Parental Responsibility/A. RECOGNITION AND ENFORCEMENT UNDER THE 'BRUSSELS II' REGULATION/278. Enforcement of judgment.

278. Enforcement of judgment.

In England¹, once the required period has expired², a judgment duly registered³ may be enforced⁴. Any party wishing to apply for the enforcement of a judgment so registered must produce to the proper officer⁵ a witness statement or affidavit of service of the notice of registration of the judgment⁶ and of any order made by the court in relation to the judgment⁷.

Registration of the judgment in accordance with these provisions serves as a decision that the judgment is recognised⁸.

Where it is sought to apply for recognition of a judgment, the same procedure applies as applies to an application for registration⁹ with minor modifications¹⁰.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 I.e. the period specified in accordance with the Family Proceedings Rules 1991, SI 1991/1247, r 7.44(2) (see para 274 note 15 ante) or, if that period has been extended by the court, until after the expiration of the period so extended: Family Proceedings Rules 1991, SI 1991/1247, r 7.47(1) (added by SI 2001/821).

3 I.e. registered under the 'Brussels II' Regulation art 21 para 2. See paras 273-274 ante. For the meaning of 'judgment' for these purposes see para 273 note 2 ante. As to the 'Brussels II' Regulation see para 242 note 4 ante.

4 Family Proceedings Rules 1991, SI 1991/1247, r 7.47(1) (as added: see note 1 supra). This provision does not prevent the court from granting protective measures under the 'Brussels II' Regulation art 12 (see para 242 text and notes 15-16 ante) pending final determination of any issue relating to enforcement of the judgment: Family Proceedings Rules 1991, SI 1991/1247, r 7.47(3) (added by SI 2001/821).

5 For the meaning of 'proper officer' for these purposes see para 274 note 15 ante.

6 As to the notice of registration of the judgment see para 274 text and notes 14-15 ante.

7 Family Proceedings Rules 1991, SI 1991/1247, r 7.47(2) (added by SI 2001/821).

8 Family Proceedings Rules 1991, SI 1991/1247, 7.48(1) (added by SI 2001/821). This procedure satisfies the requirements of the 'Brussels II' Regulation art 14 para 3: see para 251 ante.

9 See paras 273-274 ante.

10 Family Proceedings Rules 1991, SI 1991/1247, r 7.48(2) (added by SI 2001/821). Pursuant to such an application, the applicant is not required to produce either a document or documents which establish that according to the law of the contracting state in which it has been given the judgment is enforceable and has been served, or the document showing that the party making the application is in receipt of legal aid in the contracting state in which the judgment was given: Family Proceedings Rules 1991, SI 1991/1247, r 7.48(2) (as so added).

UPDATE

273-280 Recognition and Enforcement under the 'Brussels II' Regulation

For further provision under the 'Brussels II' Regulation (as replaced: see PARA 242) relating to the service of certificates concerning rights of access and certificates concerning the return of the child, and applications for the transfer of proceedings to a

court of another member state, see the Family Proceedings Rules 1991, SI 1991/1247, rr 7.51-7.55 (added by SI 2005/264).

278 Enforcement of judgment

NOTE 3--Now refers to 'Brussels II' Regulation art 28 para 2: SI 1991/1247 r 7.47(1) (amended by SI 2005/264).

NOTE 4--Now refers to 'Brussels II' Regulation art 20: SI 1991/1247 r 7.47(3) (amended by SI 2005/264).

NOTE 7--SI 1991/1247 r 7.47(2) amended: SI 2005/264.

NOTE 8--Now refers to 'Brussels II' Regulation art 21 para 3: SI 1991/1247 r 7.48(1) amended: SI 2005/264.

TEXT AND NOTE 9--Now for recognition or non-recognition of a judgment: SI 1991/1247 r 7.48(2) (amended by SI 2005/264).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(iii) Recognition and Enforcement of Orders relating to Parental Responsibility/A. RECOGNITION AND ENFORCEMENT UNDER THE 'BRUSSELS II' REGULATION/279. Legal aid.

279. Legal aid.

An applicant before an English court¹ who, in another member state², has benefited from complete or partial legal aid or exemption from costs or expenses, is entitled in relation to proceedings involving the enforcement of a judgment³ to benefit from the most favourable legal aid or the most extensive exemption from costs provided for by English law⁴.

1 For the meaning of 'court' see para 242 note 3 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 For the meaning of 'member state' see para 242 note 4 ante.

3 For the meaning of 'judgment' for these purposes see para 251 note 2 ante. The proceedings referred to in the text are those provided for in the 'Brussels II' Regulation arts 22-25 (as to which see paras 273-274 ante). As to the 'Brussels II' Regulation see para 242 note 4 ante.

4 'Brussels II' Regulation art 30. As to the availability of legal aid in proceedings in England see LEGAL AID.

UPDATE

273-280 Recognition and Enforcement under the 'Brussels II' Regulation

For further provision under the 'Brussels II' Regulation (as replaced: see PARA 242) relating to the service of certificates concerning rights of access and certificates concerning the return of the child, and applications for the transfer of proceedings to a court of another member state, see the Family Proceedings Rules 1991, SI 1991/1247, rr 7.51-7.55 (added by SI 2005/264).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(iii) Recognition and Enforcement of Orders relating to Parental Responsibility/A. RECOGNITION AND ENFORCEMENT UNDER THE 'BRUSSELS II' REGULATION/280. Security for enforcement.

280. Security for enforcement.

No security, bond or deposit, however described, may be required of a party who applies to an English court¹ for enforcement of a judgment² given in another member state³ on the grounds that: (1) he or she is not habitually resident⁴ in England; or (2) that he or she is either a foreign national or does not have his or her domicile⁵ in England⁶.

1 For the meaning of 'court' see para 242 note 3 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 For the meaning of 'judgment' for these purposes see para 251 note 2 ante.

3 For the meaning of 'member state' see para 242 note 4 ante.

4 As to habitual residence see paras 59-61 ante.

5 As to domicile for these purposes see para 242 note 11.

6 'Brussels II' Regulation art 31. As to the 'Brussels II' Regulation see para 242 note 4 ante.

UPDATE

273-280 Recognition and Enforcement under the 'Brussels II' Regulation

For further provision under the 'Brussels II' Regulation (as replaced: see PARA 242) relating to the service of certificates concerning rights of access and certificates concerning the return of the child, and applications for the transfer of proceedings to a court of another member state, see the Family Proceedings Rules 1991, SI 1991/1247, rr 7.51-7.55 (added by SI 2005/264).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(iii) Recognition and Enforcement of Orders relating to Parental Responsibility/B. RECOGNITION AND ENFORCEMENT UNDER THE CHILD ABDUCTION AND CUSTODY ACT 1985/281. The recognition and enforcement of orders under the Child Abduction and Custody Act 1985.

B. RECOGNITION AND ENFORCEMENT UNDER THE CHILD ABDUCTION AND CUSTODY ACT 1985

281. The recognition and enforcement of orders under the Child Abduction and Custody Act 1985.

Between member states of the European Union, the 'Brussels II' Regulation governs all parental responsibility orders made pursuant to matrimonial proceedings in member states¹.

The Regulation takes precedence over the European Convention on the Custody of Children², but the Convention continues to apply to the recognition and enforcement of custody orders where such orders are made by the courts of contracting states³ which are not member states of the European Union, or where the 'Brussels II' Regulation does not apply (that is to say, where the parental responsibility order is not made pursuant to matrimonial proceedings)⁴. The Convention is given effect in English law by Part II of the Child Abduction and Custody Act 1985⁵, which provides for any person to make an application in an appropriate court in the United Kingdom for the registration of a decision relating to custody which confers rights upon the applicant and which has been made by an authority in a contracting state other than the United Kingdom⁶. The central authority⁷ in the United Kingdom must assist such a person in making such an application if a request for such assistance is made by him (or on his behalf by the central authority of the contracting state in question)⁸. Such an application or request is treated as a request for enforcement for the purposes of the Convention⁹. Where a decision relating to custody has been registered, the court in which it is registered has the same powers for the purpose of enforcing the decision as if it had been made by that court; and proceedings for or with respect to enforcement may be taken accordingly¹⁰.

In dealing with cases involving the wrongful abduction of a child, the exercise of jurisdiction under the 'Brussels II' Regulation is expressed to be subject to conformity with the Hague Convention on Child Abduction¹¹, in particular those provisions which define abduction¹² and restrain state parties from making decisions in relation to the merits of rights of custody before the decision has been made whether to return the child¹³. The Convention, which is given effect in English law by Part I of the Child Abduction and Custody Act 1985¹⁴, applies to any child who was habitually resident in a contracting state immediately prior to any breach of custody or access rights, whether or not a custody order has been made¹⁵. The Convention ceases to apply when the child attains the age of 16 years¹⁶.

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply¹⁷ either to the central authority¹⁸ of the child's habitual residence or to the central authority of any other contracting state for assistance in securing the return of the child¹⁹. When it is manifest that the requirements of the Hague Convention on Child Abduction are not fulfilled or that the application is otherwise not well founded, a central authority is not bound to accept the application²⁰.

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested state is not a ground for refusing to return a child under the Hague Convention on Child Abduction, but the judicial or administrative authorities of the requested state may take account of the reasons for such a decision in applying the Convention²¹. It has been said that the discretion should be exercised in the light of the approach of the Convention, and that

it is only if the interests of the child render it appropriate for the courts of the country to which the child has been removed to decide the child's future that there should be any exception to the general principle that there should be an order for return²².

A decision under the Hague Convention on Child Abduction concerning the return of the child is not taken to be a determination on the merits of any custody issue²³.

1 As to jurisdiction under the 'Brussels II' Regulation see para 265 ante. As to the 'Brussels II' Regulation see para 242 note 4 ante. For the meaning of 'member state' see para 242 note 4 ante.

The Regulation takes precedence in relations between member states over the Convention on the Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Hague, 19 October 1996), except where the child concerned is habitually resident in a non-member state, and in so far as the 'Brussels II' Regulation concerns any matter governed by the Convention: see the 'Brussels II' Regulation art 37; and para 265 note 3 ante.

2 I.e. the European Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children (Luxembourg, 20 May 1980; TS 35 (1987); Cm 191). See CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 818 et seq. In England, under the Children Act 1989, the term 'parental responsibility' is used in preference to the term 'custody': see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 133 et seq. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 As to the states which are parties to the Convention see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 802.

4 In relations between member states, the 'Brussels II' Regulation takes precedence over the European Convention on the Custody of Children (amongst others) in so far as it concerns matters governed by the Regulation: 'Brussels II' Regulation art 37. See also the Child Abduction and Custody Act 1985 s 12(3) (added by the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001, SI 2001/310, reg 5), which ensures that the 'Brussels II' Regulation (and hence the Hague Convention on Child Abduction: see note 11 infra) take precedence over the European Convention on the Custody of Children as given effect by the Child Abduction and Custody Act 1985 (see the text and note 5 infra) and any rules of court made pursuant to s 24. As to proposals to widen the scope of the 'Brussels II' Regulation see para 65 note 1 ante.

5 I.e. the Child Abduction and Custody Act 1985 Pt II (ss 12-24) (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) paras 799-804, 818-826). The European Convention on the Custody of Children arts 1, 4-5, 7, 9-13, 15, 26 are set out in the Child Abduction and Custody Act 1985 s 12(2), Sch 2.

6 Child Abduction and Custody Act 1985 s 16(1). See also the European Convention on the Custody of Children art 4(1). In any proceedings under the Child Abduction and Custody Act 1985 Pt II (as amended) a decision of an authority outside the United Kingdom may be proved by a duly authenticated copy of the decision; and any document purporting to be such a copy is deemed to be a true copy unless the contrary is shown: s 22. The European Convention on the Custody of Children requires that applications made thereunder be accompanied by documents as specified in art 13 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 819): art 4(2). The court has jurisdiction to allow a child to be separately represented in proceedings under the European Convention on the Custody of Children, which it can exercise in exceptional circumstances: *Re T (Abduction: Appointment of Guardian ad Litem)* [1999] 2 FLR 796. For the meaning of 'United Kingdom' see para 4 ante.

7 The functions of the central authority are discharged in England and Northern Ireland by the Lord Chancellor: see the Child Abduction and Custody Act 1985 s 14(1); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 803.

8 Ibid s 16(2).

9 Ibid s 16(3). As to the grounds on which the High Court must refuse to register a decision see s 16(4); the European Convention art 10; and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 823.

10 Child Abduction and Custody Act 1985 s 18.

11 I.e. the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33): see the 'Brussels II' Regulation art 4.

12 I.e. the Hague Convention on Child Abduction art 3: see the 'Brussels II' Regulation art 4. The High Court may, on an application made for the purposes of the Convention by any person appearing to the court to have an interest in the matter, make a declaration that the removal of any child from, or his retention outside, the

United Kingdom was wrongful within the meaning of art 3: Child Abduction and Custody Act 1985 s 8. As to wrongful removal or retention see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 808.

13 The Hague Convention on Child Abduction art 16: see the 'Brussels II' Regulation art 4. The reference in the Hague Convention on Child Abduction art 16 to deciding on the merits of rights of custody is construed in English law as a reference to:

- 112 (1) making, varying or revoking a custody order, or a supervision order under the Children Act 1989 s 31 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 271) (Child Abduction and Custody Act 1985 s 9(a) (amended by the Children Act 1989 s 108(5), Sch 13 para 57));
- 113 (2) enforcing under the Family Law Act 1986 s 29 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 839) a custody order within the meaning of the Family Law Act 1986 Pt I Ch V (ss 25-32) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 837) (Child Abduction and Custody Act 1985 s 9(aa) (added by the Family Law Act 1986 s 68(1), Sch 1 para 28)); or
- 114 (3) registering or enforcing a decision under the Child Abduction and Custody Act 1985 Pt II (as amended) (s 9(b)).

14 See *ibid* Pt I (ss 1-11) (as amended). The Hague Convention on Child Abduction arts 3-5, 7-19, 21-22, 24, 26-32 are set out in the Child Abduction and Custody Act 1985 s 1(2), Sch 1. See CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) paras 799-817.

15 See the Hague Convention on Child Abduction art 3. The Convention does not apply where a child has no habitual residence: *W v H (Child Abduction: Surrogacy)* [2002] 1 FLR 1008. For the purposes of the Convention, 'rights of custody' include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence: Hague Convention art 5(a). Rights of custody may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of the state in which the child was habitually resident immediately before the removal or retention: see art 3. 'Rights of access' include the right to take a child for a limited period of time to a place other than the child's habitual residence: art 5(b). In England, under the Children Act 1989, the term 'contact' is used in preference to the term 'access': see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 251. The term 'habitual residence' is not defined in the Convention; however, see paras 59-61 *ante*.

16 See the Hague Convention on Child Abduction art 4. The Convention must be taken at face value and therefore does not apply to a child who is 16 at the date of hearing but was 15 when the wronged parent made his application: *Re H (Child Abduction: Child of Sixteen)* [2000] 3 FCR 404, sub nom *Re H (Abduction: Child of 16)* [2000] 2 FLR 51. Although the child should be resident in a contracting state at the time of the application, the Convention applies whether or not the child was resident in the state in which the right of custody or access arose: *Re G (A Minor) (Enforcement of Access Abroad)* [1993] Fam 216, [1993] All ER 657, sub nom *Re G (A Minor) (Hague Convention: Access)* [1993] 1 FLR 669, CA. It is for the applicant to establish that the court has jurisdiction, but if residence immediately before the removal is established, the burden shifts to the defendant to show that the child was not so resident: *Re E (A Minor)* [1993] Fam Law 15, CA (on appeal from *F v S (Wardship: Jurisdiction)* [1993] 2 FLR 686).

17 As to the content of such an application see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 809.

18 The functions of the central authority are discharged in England, Wales and Northern Ireland by the Lord Chancellor: see the Child Abduction and Custody Act 1985 s 3(1); and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 803.

19 Hague Convention on Child Abduction art 8. If the central authority receiving an application has reason to believe that the child is in another contracting state, it must directly and without delay transmit the application to the central authority of that contracting state and inform the requesting central authority, or the applicant, as the case may be: art 9. As to the kinds of appropriate measure to be taken by a central authority in order to obtain the voluntary return of the child see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 809.

20 In that case, the central authority must forthwith inform the applicant or the central authority through which the application was submitted, as the case may be, of its reasons: *ibid* art 27. A central authority may require that the application be accompanied by a written authorisation empowering it to act on behalf of the applicant, or to designate a representative so to act: art 28. As to exceptions to the requirement to order return see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 811.

21 *Ibid* art 17. See *Re R (Minors) (Child Abduction: Acquiescence)* [1995] 2 FCR 609, [1995] 1 FLR 716, CA. The provisions of the Hague Convention on Child Abduction arts 8-19 do not limit the power of a judicial or administrative authority to order the return of the child at any time: art 18.

22 *Re A (Minors) (Abduction: Custody rights)*[1992] Fam 106, [1992] 1 All ER 929, CA, per Lord Donaldson MR.

23 Hague Convention on Child Abduction art 19.

UPDATE

281 The recognition and enforcement of orders under the Child Abduction and Custody Act 1985

NOTE 4--1985 Act s 12(3), (4) substituted for s 12(3): European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005, SI 2005/265. SI 2001/310 reg 5 revoked: SI 2005/265.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(iii) Recognition and Enforcement of Orders relating to Parental Responsibility/C. CHILD ABDUCTION: RECOGNITION AND ENFORCEMENT UNDER COMMON LAW RULES/282. The recognition and enforcement of orders in relation to child abduction under common law rules.

C. CHILD ABDUCTION: RECOGNITION AND ENFORCEMENT UNDER COMMON LAW RULES

282. The recognition and enforcement of orders in relation to child abduction under common law rules.

Where the 'Brussels II' Regulation¹ and the Hague Convention on Child Abduction² do not apply³, the English⁴ court, in deciding any question as to the upbringing of a child⁵, must make the child's welfare its paramount consideration⁶ and, in making its own assessment, relevant provisions of foreign law or orders made by foreign courts are to be given due weight but are not decisive⁷. The court will take into account the principles underlying the Hague Convention on Child Abduction⁸, even where the Convention provisions do not apply as the foreign state concerned is not a party to it⁹. However, the provisions of the Convention must not be applied too literally¹⁰. The welfare of the child remains the paramount consideration, but in assessing it the court will take into account the kidnapper's conduct and its effect on the child¹¹. The court may order the child's return to the foreign country to minimise the harmful consequences of a kidnapping and in some cases it will do so by way of a summary order without necessarily examining all the issues in the case: this prevents a kidnapper from gaining an advantage through the passing of time¹². However, before ordering the return of a child in such cases, the court should satisfy itself that the welfare principle will be applied in the foreign court¹³.

1 As to the 'Brussels II' Regulation see para 242 note 4 ante.

2 I.e. the Convention on the Civil Aspects of International Child Abduction (Hague, 25 October 1980; TS 66 (1986); Cm 33).

3 See para 273 et seq ante. As to the extent that special considerations apply to such cases see *Re H (Infants)* [1966] 1 All ER 886, [1966] 1 WLR 381 at 393, CA; *Re E (D) (An Infant)* [1967] Ch 761, [1967] 2 All ER 881, CA. See also *Re P (GE) (An Infant)* [1965] Ch 568 at 588, [1964] 3 All ER 977 at 984, CA; *Re T (Infants)* [1968] Ch 704, [1968] 3 All ER 411; *Re S (M) (An Infant)* [1971] Ch 621 at 624-625, [1971] 1 All ER 459 at 462; *Re F (A Minor) (Abduction: Custody Rights)* [1991] Fam 25, [1990] 3 All ER 97, CA; and see *Re T (An Infant)* [1969] 3 All ER 998, [1969] 1 WLR 1608 (child almost of age).

4 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

5 I.e. a person under the age of 18: Children Act 1989 s 105(1).

6 Ibid s 1(1). As to the welfare principle under the Children Act 1989 see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 300.

7 *J v C* [1970] AC 668 at 700-701, 720, [1969] 1 All ER 788 at 812, 828-829, HL; *Re B----'s Settlement, B---- v B----* [1940] Ch 54; *McKee v McKee* [1951] AC 352, [1951] 1 All ER 942, PC; *Re E (D) (An Infant)* [1967] Ch 761, [1967] 2 All ER 881, CA; *Re B (S) (An Infant)* [1968] Ch 204, [1967] 3 All ER 629. See also *Uhlig v Uhlig* (1916) 115 LT 647, CA (English public policy precluded order for removal of child to enemy jurisdiction).

8 See para 281 ante; and CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 799 et seq.

9 *G v G (Minors)* [1991] 2 FLR 506, CA; *Re F (A Minor) (Abduction: Custody Rights)* [1991] Fam 25, [1990] 3 All ER 97, CA; *Re S (Minors) (Abduction)* [1993] 2 FCR 499, CA; *D v D (Child Abduction)* [1994] 1 FCR 654, CA; *Re M (Abduction: Non-Convention Country)* [1995] 1 FLR 89, CA; *Re M (Jurisdiction: Forum Conveniens)* [1995] 2 FLR 224, CA.

10 *Re P (Abduction: Non-Convention Country)*[1997] Fam 45.

11 *Re L (Minors)* [1974] 1 All ER 913, [1974] 1 WLR 250, CA (applying *J v C* [1970] AC 668, [1969] 1 All ER 788, HL); *Re H (Infants)* [1966] 1 All ER 886, [1966] 1 WLR 381 at 393, CA; *Re E (D) (An Infant)* [1967] Ch 761, [1967] 2 All ER 881, CA. Cf *Re Kernot (An Infant)*, *Kernot v Kernot* [1965] Ch 217, [1964] 3 All ER 339. See also *Re P (Abduction)*[1996] 3 FCR 233.

12 *Re L (Minors)* [1974] 1 All ER 913, [1974] 1 WLR 250, CA; *Re H (Infants)* [1966] 1 All ER 886, [1966] 1 WLR 381 at 393, CA; *Re C (Minors) (Wardship: Jurisdiction)* [1978] Fam 105, [1978] 2 All ER 230, CA; *Re F (A Minor) (Abduction: Custody Rights)* [1991] Fam 25, [1990] 3 All ER 97, CA; *Re M (Minors) (Abduction: Peremptory Return Order)* (1995) Times, 20 November.

13 *Re JA (Child Abduction: Non-Convention Country)*[1998] 1 FLR 231.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(3) ORDERS AS TO CHILDREN/(iii) Recognition and Enforcement of Orders relating to Parental Responsibility/D. RECOGNITION AND ENFORCEMENT BETWEEN DIFFERENT PARTS OF THE UNITED KINGDOM OF ORDERS MADE IN RELATION TO CHILDREN/283. Recognition of orders.

D. RECOGNITION AND ENFORCEMENT BETWEEN DIFFERENT PARTS OF THE UNITED KINGDOM OF ORDERS MADE IN RELATION TO CHILDREN

283. Recognition of orders.

Where an order¹ made by a court in any part of the United Kingdom² or a specified dependent territory³ is in force with respect to a child who has not attained the age of 16, the order is recognised in any other part of the United Kingdom (or, where the order was made in a dependent territory, in any part of the United Kingdom) as having the same effect in that part as if it had been made by the appropriate court in that part and as if that court had had jurisdiction to make it⁴. However, an order so recognised in a part of the United Kingdom will not be enforced there unless it has been registered⁵ in that part of the United Kingdom and proceedings for enforcement⁶ are taken⁷.

1 Ie a 'Part I order': see para 266 text and note 3 ante.

2 For the meaning of 'United Kingdom' see para 4 ante; and for the meaning of 'part of the United Kingdom' for these purposes see para 268 note 8 ante.

3 For the meaning of 'dependent territories' see para 267 note 8 ante. At the date at which this volume states the law, the Isle of Man had been specified: see para 267 note 8 ante.

4 Family Law Act 1986 s 25(1) (amended by the Children Act 1989 s 108(5), Sch 13 para 62; and by the Family Law Act 1986 (Dependent Territories) Order 1991, SI 1991/1723, art 3(2), Sch 2 para 12). This does not extend to provisions in the order as to the means by which rights conferred by the order are to be enforced: Family Law Act 1986 s 25(2) (s 25(2), (3) amended by the Children Act 1989 Sch 13 para 62). In relation to England, Wales or Northern Ireland, 'appropriate court' means the High Court, and, in relation to Scotland, 'appropriate court' means the Court of Session: Family Law Act 1986 s 32(1).

5 Ie under *ibid* s 27 (as amended): see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 838.

6 Ie under *ibid* s 29 (as amended): see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 839.

7 Ibid s 25(3) (as amended: see note 4 *supra*). A registered order becomes unenforceable if it is superseded by an order made by a court in England: *S v S (Custody: Jurisdiction)* [1995] 1 FLR 155.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/(i) Jurisdiction of the Court/284. Jurisdiction.

(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF

(i) Jurisdiction of the Court

284. Jurisdiction.

The English court¹ has power to award maintenance pending suit to either party to proceedings for divorce, nullity of marriage or judicial separation². This power may be exercised even though a substantial question which has been raised as to the court's jurisdiction over the principal proceedings awaits determination³.

On granting a decree or at any time thereafter, the court has power to make orders for the payment by one party of a lump sum or sums or for periodical payments⁴, the transfer or settlement of property, the variation of settlements made on the parties, the extinction or reduction of the interest of either of the parties under any such settlement⁵, the sale of property⁶, and the transfer of certain tenancies⁷. The court has jurisdiction to make such orders whenever it has jurisdiction in the main suit⁸, but will not exercise its powers when the order would be ineffectual or would infringe the authority of a foreign court⁹. This jurisdiction in ancillary proceedings is unaffected by the 'Brussels I' Regulation and the Brussels and Lugano Conventions¹⁰.

Orders for periodical payments or for the payment of lump sums may also be made in cases where there has been a failure by a party to a marriage to provide reasonable maintenance for the other party or certain children of the family¹¹. The court has jurisdiction:

- 270 (1) if the applicant or the respondent is domiciled in England on the date of the application; or
- 271 (2) if the applicant has been habitually resident¹² in England throughout the period of one year ending with that date; or
- 272 (3) if the respondent is resident in England on that date¹³.

The court also has jurisdiction:

- 273 (a) if the respondent is domiciled¹⁴ in England¹⁵;
- 274 (b) if the respondent is domiciled in any other part of the United Kingdom or in another 'Brussels I' Regulation state or Brussels or Lugano contracting state¹⁶ and the court is the court for the place where the maintenance creditor is so domiciled or habitually resident¹⁷; or
- 275 (c) if the respondent enters an appearance otherwise than solely to contest the jurisdiction¹⁸.

1 In the Matrimonial Causes Act 1973, 'court', except where the context otherwise requires, means the High Court or, where a county court has jurisdiction by virtue of the Matrimonial and Family Proceedings Act 1984 Pt V (ss 32-44) (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 732 et seq), a county court: Matrimonial Causes Act 1973 s 52(1) (definition amended by the Matrimonial and Family Proceedings Act 1984 s 46(1), Sch 1 para 16). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See the Matrimonial Causes Act 1973 s 22; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 456.

3 *Ronalds v Ronalds* (1875) LR 3 P & D 259. In *Inverclyde (otherwise Tripp) v Inverclyde* [1931] P 29, the petition for alimony fell with the main petition but without argument on the point. See *Smith v Smith* [1923] P 128; *Johnstone v Johnstone* [1929] P 165, CA (payment of wife's costs in similar circumstances).

4 See the Matrimonial Causes Act 1973 s 23 (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 450 et seq.

5 See *ibid* s 24; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 499 et seq.

6 See *ibid* s 24A (as added and amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 520-521.

7 See MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 310 et seq.

8 *Nunneley v Nunneley and Marrian* (1890) 15 PD 186; *Forsyth v Forsyth* [1891] P 363; *Hunter v Hunter and Waddington* [1962] P 1, [1961] 2 All ER 121; *Cammell v Cammell* [1965] P 467, [1964] 3 All ER 255.

9 *Tallack v Tallack and Broekema* [1927] P 211; *Goff v Goff* [1934] P 107; *Wylar v Lyons* [1963] P 274, [1963] 1 All ER 821.

10 The jurisdiction rules for English courts in such matters are contained in the Domicile and Matrimonial Proceedings Act 1973 s 5: see para 243 ante. As to the jurisdiction rules contained in the 'Brussels I' Regulation and the Brussels and Lugano Conventions see para 92 ante. The English court's jurisdiction is subject always to the provisions of the Regulation and the Conventions governing jurisdiction agreements (as to which see para 79 ante) and mandatory stays of proceedings (as to which see paras 127-128 ante). As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

11 See the Matrimonial Causes Act 1973 s 27(1) (substituted by the Domestic Proceedings and Magistrates' Courts Act 1978 s 63). This relief is not necessarily ancillary to proceedings for divorce, nullity of marriage or judicial separation. As to the children of the family to whom this provision applies see the Matrimonial Causes Act 1973 s 27(3) (substituted by the Matrimonial and Family Proceedings Act 1984 s 4). As to the variation of orders see the Matrimonial Causes Act 1973 s 31(1), (2) (s 31(1) amended by the Matrimonial and Family Proceedings Act 1984 s 6(2); and the Matrimonial Causes Act 1973 s 31(2) amended by the Matrimonial Homes and Property Act 1981 s 8(2)). See also MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 542 et seq.

12 As to the meaning of 'habitually resident' see *Kapur v Kapur* [1984] FLR 920; and paras 59-61 ante.

13 Matrimonial Causes Act 1973 s 27(2) (amended by the Domicile and Matrimonial Proceedings Act 1973 s 6(1)). These bases for jurisdiction are excluded if the court has jurisdiction under the 'Brussels I' Regulation or the Brussels Convention or the Lugano Convention (see note 10 supra), or the corresponding scheme in force within the United Kingdom: 'Brussels I' Regulation art 3; Brussels Convention art 3; Lugano Convention art 3; Civil Jurisdiction and Judgments Act 1982 s 16(1), Sch 4 rule 2 (s 16(1) amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt II para 3(a); and the Civil Jurisdiction and Judgments Act 1982 Sch 4 substituted by the Civil Jurisdiction and Judgments Order 2001, Sch 2 Pt II para 4). As to the adaptation of the provisions of the Conventions by the Civil Jurisdiction and Judgments Act 1982 Sch 4 to a scheme applying as between parts of the United Kingdom see para 66 ante. For the meaning of 'United Kingdom'; and for the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

14 *Ie* as defined in the Civil Jurisdiction and Judgments Act 1982 s 41 (as amended); and the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 para 9: see para 84 ante.

15 See the 'Brussels I' Regulation art 2; the Brussels Convention art 2; the Lugano Convention art 2; the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 1; and para 83 ante.

16 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

17 See the 'Brussels I' Regulation art 5 para 2; the Brussels Convention art 5 para 2; the Lugano Convention art 5 para 2; the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 3(b); and para 92 ante.

18 See the 'Brussels I' Regulation art 24; the Brussels Convention art 18; the Lugano Convention art 18; the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 13; and para 78 ante.

UPDATE

284 Jurisdiction

NOTE 3--*Ronald*, cited, applied *Moses-Taiga v Taiga*[2005] EWCA Civ 1013, [2008] 1 FCR 696.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/(i) Jurisdiction of the Court/285. Magistrates' courts.

285. Magistrates' courts.

Magistrates' courts have power under the Domestic Proceedings and Magistrates' Courts Act 1978 to make orders, including orders as to lump sums and periodical payments, in respect of maintenance. A magistrates' court has jurisdiction to make an order if the applicant or respondent ordinarily resides¹, at the date when the application is made, within the commission area² for which the court is appointed³. Jurisdiction is exercisable notwithstanding that any party to the proceedings is not domiciled in England⁴. Even if one of these conditions is satisfied, it must still be shown that the respondent is subject to the jurisdiction of the English courts⁵.

A magistrates' court has jurisdiction:

- 276 (1) if the respondent is domiciled⁶ in another part of the United Kingdom or in another 'Brussels I' Regulation state or Brussels or Lugano contracting state⁷ and the court is the court for the place where the maintenance creditor is domiciled or habitually resident⁸; or
- 277 (2) the respondent enters an appearance otherwise than solely to contest the jurisdiction⁹.

Provision in respect of claims for maintenance by persons outside the United Kingdom is made by the Maintenance Orders (Reciprocal Enforcement) Act 1972¹⁰.

1 As to ordinary residence see para 58 ante.

2 As to commission areas see MAGISTRATES vol 29(2) (Reissue) para 507.

3 See the Domestic Proceedings and Magistrates' Courts Act 1978 s 30(1) (amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 163; the Family Law Act 1986 s 68(1), Sch 1 para 24; and the Police and Magistrates' Courts Act 1994 s 91(1), Sch 8 para 29). This is expressed to be subject to the Family Law Act 1986 s 2 (as substituted) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) para 831), and to the Magistrates' Courts Act 1980 s 70 (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 591).

4 Domestic Proceedings and Magistrates' Courts Act 1978 s 30(5). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

5 *Berkley v Thompson* (1884) 10 App Cas 45, HL; *Forsyth v Forsyth* [1948] P 125, [1947] 2 All ER 623, CA; *Collister v Collister* [1972] 1 All ER 334, [1972] 1 WLR 54, DC. Formerly, rules existed to establish the jurisdiction of English magistrates' courts where the applicant and respondent resided in different parts of the United Kingdom, so long as one of them resided in England: see the Domestic Proceedings and Magistrates' Courts Act 1978 s 30(3) (repealed). Jurisdiction of the courts of different parts of the United Kingdom is now to be determined in accordance with the Civil Jurisdiction and Judgments Act 1982 s 16, Sch 4 (both as amended): see the text and notes 6-10 infra; and paras 66, 70 ante. For the meaning of 'United Kingdom' see para 4 ante; and for the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

6 *le* as defined in the Civil Jurisdiction and Judgments Act 1982 s 41 (as amended) and the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 para 9: see para 84 ante.

7 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. These provisions are subject always to the provisions of the Regulation and Conventions governing jurisdiction agreements (as to which see para 79 ante) and mandatory stays of proceedings (as to which see paras 127-128 ante).

8 See para 92 text and notes 1-3 ante.

9 See para 78 ante.

10 See paras 310-334 post.

UPDATE

285 Magistrates' courts

NOTE 3--Domestic Proceedings and Magistrates' Courts Act 1978 s 30(1) further amended: Courts Act 2003 Sch 8 para 194.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/(i) Jurisdiction of the Court/286. Financial provision for children.

286. Financial provision for children.

The power to make orders for periodical payments or for the payment of lump sums or the transfer of property to, or for the benefit of, a child¹ may be made if the respondent is served with process in England or elsewhere², or if:

- 278 (1) the respondent is domiciled³ in England⁴; or
- 279 (2) the respondent is domiciled in any other part of the United Kingdom⁵ or in another 'Brussels I' Regulation or Brussels or Lugano contracting state⁶ and the child is domiciled or habitually resident⁷ in England⁸; or
- 280 (3) the respondent enters an appearance other than solely to contest the jurisdiction⁹.

The court has the power to vary or revoke any financial arrangements in a maintenance agreement¹⁰ in respect of a child if each of the parents is either domiciled or resident in England¹¹, or if any of heads (1) to (3) above applies¹².

1 See the Children Act 1989 s 15(1), Sch 1 paras 1-9 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 539 et seq. 'Child' generally means a person who has not attained the age of 18, but may in certain circumstances refer to a person who has attained that age and is in full-time education: see s 105(1), Sch 1 para 16; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 3.

2 See the Family Proceedings Rules 1991, SI 1991/1247, r 10.6; and *Re Dulles' Settlement* [1951] Ch 265, [1950] 2 All ER 1013, CA; *Re Dulles' Settlement (No 2)* [1951] Ch 842, [1951] 2 All ER 69, CA. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. These bases for jurisdiction are excluded if the court has jurisdiction under the 'Brussels I' Regulation or the Brussels Convention or the Lugano Convention, or the corresponding scheme in force within the United Kingdom: 'Brussels I' Regulation art 3; Brussels Convention art 3; Lugano Convention art 3; Civil Jurisdiction and Judgments Act 1982 s 16(1), Sch 4 rule 2 (s 16(1) amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt II para 3(a); and the Civil Jurisdiction and Judgments Act 1982 Sch 4 substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt II para 4). As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. As to the adaptation of the provisions of the Conventions by the Civil Jurisdiction and Judgments Act 1982 Sch 4 to a scheme applying as between parts of the United Kingdom see para 66 ante.

3 As defined in the Civil Jurisdiction and Judgments Act 1982 s 41 (as amended) and the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 para 9: see para 84 ante.

4 See the Brussels Convention art 2; the Lugano Convention art 2; and para 83 ante. See also the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 1.

5 For the meaning of 'United Kingdom' see para 4 ante; and for the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

6 For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante.

7 As to the meaning of 'habitually resident' see *Kapur v Kapur* [1984] FLR 920; and paras 59-61 ante.

8 See the 'Brussels I' Regulation art 5 para 2; the Brussels Convention art 5 para 2; the Lugano Convention art 5 para 2; the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 3(b); and para 92 ante.

9 See the 'Brussels I' Regulation art 24; the Brussels Convention art 18; the Lugano Convention art 18; the Civil Jurisdiction and Judgments Act 1982 Sch 4 rule 13; and para 78 ante.

10 For the meaning of 'maintenance agreement' see the Children Act 1989 Sch 1 para 10; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 549.

11 See *ibid* Sch 1 paras 10, 11; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 549. As to the exclusion of this basis for jurisdiction see note 2 *supra*.

12 See the text and notes 3-9 *supra*.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/(i) Jurisdiction of the Court/287. Contribution orders.

287. Contribution orders.

A magistrates' court in England has power under various statutes, exercisable at the instance of certain public bodies, to make a contribution order for the recovery of the cost of maintaining a child from certain persons¹. A magistrates' court in England also has jurisdiction where the respondent resides in Scotland or Northern Ireland², and in proceedings by or against a person resident in Scotland or Northern Ireland for the revocation, revival or variation of any of these orders³. The court also has jurisdiction if the respondent is domiciled⁴ in the United Kingdom⁵; or if the respondent enters an appearance otherwise than solely to contest the jurisdiction⁶.

1 See eg the National Assistance Act 1948 s 43 (as amended) (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) para 1039); the Social Security Administration Act 1992 s 106 (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) para 398); and the Merchant Shipping Act 1995 s 40 (see SHIPPING AND MARITIME LAW vol 93 (2008) PARA 478). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 Maintenance Orders Act 1950 s 4(1) (amended by the Supplementary Benefits Act 1976 s 35(2), Sch 7 para 8; the Child Care Act 1980 s 89(3), Sch 6; and the Social Security (Consequential Provisions) Act 1992 s 4, Sch 2 para 3(1)(a)); Merchant Shipping Act 1995 s 40(7).

3 Maintenance Orders Act 1950 s 4(2) (amended by the Supplementary Benefits Act 1976 Sch 7 para 8; the Child Care Act 1980 Sch 6; and the Social Security (Consequential Provisions) Act 1992 Sch 2 para 3(2)); Merchant Shipping Act 1995 s 40(7). These bases for jurisdiction are excluded if the court has jurisdiction under the 'Brussels I' Regulation or the Brussels Convention or the Lugano Convention: 'Brussels I' Regulation art 3; Brussels Convention art 3; Lugano Convention art 3. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

4 As defined in the Civil Jurisdiction and Judgments Act 1982 s 41 (as amended) and the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 para 9: see para 84 ante.

5 See the 'Brussels I' Regulation art 2; the Brussels Convention art 2; the Lugano Convention art 2; and para 92 ante. See also Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 850-851. For the meaning of 'United Kingdom' see para 4 ante.

6 See the 'Brussels I' Regulation art 24; the Brussels Convention art 18; the Lugano Convention art 18; and para 78 ante.

UPDATE

287 Contribution orders

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

TEXT AND NOTES 2, 3--Maintenance Orders Act 1950 s 4(1), (2) further amended: Health and Social Care Act 2008 Sch 15 Pt 5.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/(i) Jurisdiction of the Court/288. Service of process.

288. Service of process.

Where the jurisdiction of a court has been extended so that it may make a maintenance order against a person resident in another part of the United Kingdom¹, any form of process addressed to him in the proceedings may, if indorsed in the prescribed manner² by the appropriate indorsing authority in that part of the United Kingdom, be served there as if it had been issued or authorised to be served by the indorsing authority³. The appropriate indorsing authority in England is a justice of the peace, in Scotland is a sheriff, and in Northern Ireland is a resident magistrate⁴. Service of process under this power may be proved in the proceedings in which it is served by means of a declaration⁵ before the appropriate indorsing authority⁶.

This power of service does not authorise other than personal service, nor the execution in one part of the United Kingdom of a warrant for the arrest of a person who fails to appear in answer to any such process issued in another part of the United Kingdom⁷.

1 le by virtue of, inter alia:

- 115 (1) the Maintenance Orders Act 1950 Pt I (ss 1-15) (as amended) (see paras 293-299 post) (s 15(1)(a)(i) (substituted by the Administration of Justice Act 1977 s 3, Sch 3 para 11));
- 116 (2) the Domestic Proceedings and Magistrates' Courts Act 1978 ss 24(1), 30(3) (repealed) (Maintenance Orders Act 1950 s 15(1)(a)(ii) (substituted by the Domestic Proceedings and Magistrates' Courts Act 1978 s 89(2)(a), Sch 2 para 12));
- 117 (3) the Children Act 1989 ss 92, 93(2)(g), Sch 11 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 208) (Maintenance Orders Act 1950 s 15(1)(a)(iii), (iv) (substituted by the Courts and Legal Services Act 1990 s 116(2), Sch 16 para 34)); and
- 118 (4) the Civil Jurisdiction and Judgments Act 1982 s 16(1), Sch 4 rule 3(b) (s 16(1) amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt II para 3(a); and the Civil Jurisdiction and Judgments Act 1982 Sch 4 substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt II para 4) (see para 92 ante) (Maintenance Orders Act 1950 s 15(1)(a)(vi) (added by the Civil Jurisdiction and Judgments Act 1982 s 16(5))).

For the meaning of 'United Kingdom' see para 4 ante; and for the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

2 See the Maintenance Orders Act 1950 s 15(2), Sch 2 Form 1.

3 Ibid s 15(1), (2) (s 15(1) amended by the Administration of Justice Act 1977 s 3, Sch 3 para 11; the Domestic Proceedings and Magistrates' Courts Act 1978 s 89(2)(a), Sch 2 para 12; the Civil Jurisdiction and Judgments Act 1982 s 16(5); and the Courts and Legal Services Act 1990 s 116(2), Sch 16 para 34). As to service of process between different parts of the United Kingdom generally see paras 118-119 ante.

4 Maintenance Orders Act 1950 ss 15(2), 28(1). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

5 The declaration must be in the form set out in ibid Sch 2 Form 2, or a form to the like effect: s 15(3).

6 Ibid s 15(3). As to proof of the declaration see s 26; and para 289 post.

7 See ibid s 15(4), (5). The Summary Jurisdiction (Process) Act 1881 s 4 (see MAGISTRATES vol 29(2) (Reissue) para 529) is excluded in these cases: Maintenance Orders Act 1950 s 15(5).

UPDATE

288 Service of process

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/(i) Jurisdiction of the Court/289. Proof of declarations and other documents.

289. Proof of declarations and other documents.

Any document purporting to be a declaration as to service of a process¹ or to be a certified copy, statutory declaration, affidavit, certificate, transcript or summary made for the purposes of the Maintenance Orders Act 1950 or rules under that Act, is deemed without further proof to be the document it purports to be and to have been made in the proper manner unless the contrary is shown².

1 le under the Maintenance Orders Act 1950 s 15 (as amended): see para 288 ante.

2 Ibid s 26(1).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/(i) Jurisdiction of the Court/290. Variation of maintenance agreements.

290. Variation of maintenance agreements.

The High Court, a divorce county court¹ or a magistrates' court has the power to vary or revoke any financial arrangements² in a maintenance agreement³ in the light of changed circumstances or the need to make proper financial arrangements with respect to any child of the family⁴. The court has jurisdiction only where each party is either domiciled or resident in England⁵. The power of a magistrates' court to vary maintenance agreements in respect of periodical payments may only be exercised if both parties are resident in England, and at least one is resident in the commission area⁶ for which the court was appointed⁷. These bases for jurisdiction are excluded if the respondent is domiciled⁸ in any other part of the United Kingdom⁹ or in another 'Brussels I' Regulation state or in a contracting state to the Brussels or Lugano Convention¹⁰.

The court also has jurisdiction:

- 281 (1) if the respondent is domiciled in England¹¹;
- 282 (2) if the respondent is domiciled in any other part of the United Kingdom or in another state which is a party to the Brussels or Lugano Convention and the court is the court for the place where the maintenance creditor is domiciled or habitually resident¹²; or
- 283 (3) if the respondent enters an appearance otherwise than solely to contest the jurisdiction¹³.

1 Jurisdiction is conferred on county courts in this regard by the operation of the Matrimonial Causes Act 1952 s 52(1) (amended by the Matrimonial and Family Proceedings Act 1984 s 46(1), Sch 1 para 16), and the Matrimonial and Family Proceedings Act 1984 s 34.

2 For the meaning of 'financial arrangements' see the Matrimonial Causes Act 1973 s 34(2); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 696.

3 For the meaning of 'maintenance agreement' see *ibid* s 34(2); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 696.

4 See *ibid* s 35(1), (2) (s 35(2) amended by the Matrimonial and Family Proceedings Act 1984 Sch 1 para 13(a)). 'Child of the family' in relation to the parties to a marriage means: (1) a child of both those parties; and (2) any other child (other than a child placed with those parties as foster parents by a local authority or voluntary organisation) treated by those parties as a child of their family: Matrimonial Causes Act 1973 s 52(1) (amended by the Children Act 1989 s 108(4), Sch 12 para 33).

5 Matrimonial Causes Act 1973 s 35(1). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

6 *Ie* a commission area within the meaning of the Justices of the Peace Act 1979: see MAGISTRATES vol 29(2) (Reissue) para 507.

7 See the Matrimonial Causes Act 1973 s 35(3) (amended by the Matrimonial and Family Proceedings Act 1984 Sch 1 para 13(b); and the Access to Justice Act 1999 s 106, Sch 15 Pt V).

8 *Ie* as defined in the Civil Jurisdiction and Judgments Act 1982 s 41 (as amended) and the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 para 9: see para 84 ante.

9 For the meaning of 'United Kingdom' see para 4 ante; and for the meaning of 'part of the United Kingdom' see para 66 note 3 ante.

10 See the 'Brussels I' Regulation art 3; the Brussels Convention art 3; the Lugano Convention art 3; and the Civil Jurisdiction and Judgments Act 1982 s 16(1), Sch 4 rule 2 (s 16(1) amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt II para 3(a); and the Civil Jurisdiction and Judgments Act 1982 Sch 4 substituted by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 2 Pt II para 4). For the meaning of 'Regulation state' see para 65 note 6 ante. For the meaning of 'contracting state' see para 65 note 5 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. As to the adaptation of the provisions of the Conventions by the Civil Jurisdiction and Judgments Act 1982 Sch 4 to a scheme applying as between parts of the United Kingdom see para 66 ante.

11 See para 84 ante.

12 See para 92 text and notes 1-3 ante.

13 See para 78 ante.

UPDATE

290 Variation of maintenance agreements

NOTE 7--Matrimonial Causes Act 1973 s 35(3) further amended: Courts Act 2003 Sch 8 para 169.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/(ii) Orders made after Foreign Decrees/291. Orders made after foreign decrees.

(ii) Orders made after Foreign Decrees

291. Orders made after foreign decrees.

The English court¹ has jurisdiction to make orders for financial relief ² after the grant in an overseas country³ of a divorce, annulment or legal separation which is entitled to recognition in England⁴.

The court has jurisdiction if:

- 284 (1) either party to the marriage was domiciled in England on the date on which the divorce, annulment or legal separation took effect in the foreign country or on the date of the application for permission⁵ to proceed with the application to the English court; or
- 285 (2) either party was habitually resident⁶ in England throughout the period of one year ending with either of those dates; or
- 286 (3) either party has, or both parties have, at the date of the application for permission, a beneficial interest in possession in a dwelling-house situated in England which was at some time during the marriage a matrimonial home of the parties⁷.

If, however, the jurisdictional provisions of the 'Brussels I' Regulation or the Brussels or Lugano Convention⁸ apply, these take precedence over the jurisdictional rules of the Matrimonial and Family Proceedings Act 1984⁹.

Before making an order the court must be satisfied that it would be appropriate for a court in England to make such an order¹⁰. In particular, in considering whether or not to make an order, the court must have regard to¹¹:

- 287 (a) the connection which the parties to the marriage have with England¹²;
- 288 (b) the connection which they have with the country in which the marriage was dissolved or annulled or in which they were legally separated¹³;
- 289 (c) the connection which they have with any other country outside England¹⁴;
- 290 (d) any financial benefit which the applicant or a child of the family¹⁵ has received, or is likely to receive, in consequence of the divorce, annulment or legal separation, by virtue of any agreement or the operation of the law of a country outside England¹⁶;
- 291 (e) in a case where an order has been made by a court in a country outside England requiring the other party to the marriage to make any payment or transfer any property for the benefit of the applicant or a child of the family, the financial relief given by the order and the extent to which the order has been complied with or is likely to be complied with¹⁷;
- 292 (f) any right which the applicant has, or has had, to apply for financial relief from the other party to the marriage under the law of any country outside England and if the applicant has omitted to exercise that right the reason for that omission¹⁸;
- 293 (g) the availability in England of any property in respect of which an order under Part III of the Matrimonial and Family Proceedings Act 1984¹⁹, in favour of the applicant, could be made²⁰;

- 294 (h) the extent to which any order made under Part III of that Act is likely to be enforceable²¹;
- 295 (i) the length of time which has elapsed since the date of the divorce, annulment or legal separation²².

1 'Court' means the High Court or, where a county court has jurisdiction by virtue of the Matrimonial and Family Proceedings Act 1984 Pt V (ss 32-42) (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 732 et seq), a county court: s 27. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 le an order under *ibid* s 17 (financial provision and property adjustment) or s 22 (powers in relation to tenancies of dwelling houses): see ss 12(4), 27.

3 'Overseas country' means a country outside the British Islands: *ibid* s 27. For the meaning of 'the British Islands' see para 4 ante.

4 See *ibid* s 12.

5 The court will grant permission for an application to be made for the making of such an order only if there are substantial grounds for making the order: see *ibid* s 13(1). See *W v W (Financial Provision)* [1989] 1 FLR 22; *Holmes v Holmes* [1989] Fam 47, [1989] 3 All ER 786, CA; *Z v Z (Foreign Divorce: Financial Provision)* [1992] 2 FLR 291; *M v M (Financial Provision after Foreign Divorce)* [1994] 2 FCR 448, [1994] 1 FLR 399; *Hewitson v Hewitson* [1995] Fam 100, [1995] 1 All ER 472, CA. Permission may be granted despite the existence of an order as to financial provision made in the overseas court, and may be granted on conditions: see the Matrimonial and Family Proceedings Act 1984 s 13(2), (3).

6 As to the meaning of 'habitually resident' see *Kapur v Kapur* [1984] FLR 920; and paras 59-61 ante.

7 Matrimonial and Family Proceedings Act 1984 s 15(1).

8 As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

9 See the Matrimonial and Family Proceedings Act 1984 s 15(2) (amended by the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 5, Sch 3 paras 18, 19). As to the jurisdictional provisions of the 'Brussels I' Regulation and the Brussels and Lugano Conventions see para 65 ante.

10 Matrimonial and Family Proceedings Act 1984 s 16(1).

11 *Ibid* s 16(2). See *Lamagni v Lamagni* [1995] 2 FLR 452, CA; *Jordan v Jordan* [1999] 2 FLR 1069.

12 Matrimonial and Family Proceedings Act 1984 s 16(2)(a).

13 *Ibid* s 16(2)(b).

14 *Ibid* s 16(2)(c).

15 For the meaning of 'child of the family' see para 290 note 4 ante; definition applied by *ibid* s 27.

16 *Ibid* s 16(2)(d).

17 *Ibid* s 16(2)(e).

18 *Ibid* s 16(2)(f).

19 le *ibid* Pt III (ss 12-27) (as amended).

20 *Ibid* s 16(2)(g).

21 *Ibid* s 16(2)(h).

22 *Ibid* s 16(2)(i).

UPDATE

291 Orders made after foreign decrees

NOTE 9--1984 Act s 15(2) further amended: Civil Jurisdiction and Judgments Regulations 2007, SI 2007/1655.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/A. ENFORCEMENT AT COMMON LAW/292. Enforcement of orders.

(iii) Enforcement of Maintenance Orders

A. ENFORCEMENT AT COMMON LAW

292. Enforcement of orders.

The order of a competent foreign court for periodical payments by way of maintenance will be enforceable in England by an action in personam on the judgment debt if and only if the foreign order is final and conclusive¹. If, as is frequently the case, the order is subject to variation in the light of changing circumstances, it will not be final and conclusive². An action may still lie in England for accrued arrears, provided that variation by the foreign court cannot operate retrospectively³. Similar principles in the law of many foreign countries hinder the enforcement of English maintenance orders abroad.

Statutory provision has been made to overcome these difficulties by providing for reciprocal enforcement of orders between different parts of the United Kingdom⁴ and between the United Kingdom and overseas countries⁵. Maintenance orders may also be enforced under the 'Brussels I' Regulation and the Brussels and Lugano Conventions⁶. Maintenance orders do not fall within the ambit of the Foreign Judgments (Reciprocal Enforcement) Act 1933⁷.

1 For the meaning of 'final and conclusive' see *Nouvion v Freeman* (1889) 15 App Cas 1, HL; and para 158 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Harrop v Harrop* [1920] 3 KB 386; *Re Macartney, Macfarlane v Macartney* [1921] 1 Ch 522.

3 *Beatty v Beatty* [1924] 1 KB 807, CA.

4 See the Maintenance Orders Act 1950 Pt II (ss 16-25) (as amended); and paras 293-300 post. For the meaning of 'United Kingdom'; and for the meaning of 'part of the United Kingdom' see para 293 note 1 post.

5 See the Maintenance Orders (Facilities for Enforcement) Act 1920 (see paras 301-309 post) and the Maintenance Orders (Reciprocal Enforcement) Act 1972 (see paras 310-334 post).

6 See para 335 post. The 'Brussels I' Regulation and the Brussels and Lugano Conventions do not override the Maintenance Orders (Reciprocal Enforcement) Act 1972 regime (see para 310 post): see the 'Brussels I' Regulation art 66; the Brussels Convention art 57; and the Lugano Convention art 57. Accordingly, the orders issued by the courts of certain countries may be enforced under either regime. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

7 See the Foreign Judgments (Reciprocal Enforcement) Act 1933 ss 1 (as amended), 11(2); and para 171 et seq ante.

UPDATE

292 Enforcement of orders

NOTE 2--See also *B v R* [2009] EWHC 2026 (Fam), [2010] 1 FLR 563.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/B. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS ACT 1950/293. Orders registrable for enforcement.

B. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS ACT 1950

293. Orders registrable for enforcement.

Various maintenance orders made by a court in any part of the United Kingdom¹ may be enforced in another part of the United Kingdom, if registered in accordance with the relevant statutory provisions² in a court of that other part of the United Kingdom³. The orders concerned are orders for alimony, maintenance or other payments made or deemed to be made by a court in England under any of the following enactments⁴:

- 296 (1) specified provisions of the Matrimonial Causes Act 1973⁵;
- 297 (2) specified provisions of the Matrimonial and Family Proceedings Act 1984⁶;
- 298 (3) Part I of the Domestic Proceedings and Magistrates' Courts Act 1978⁷;
- 299 (4) specified provisions of the Children Act 1989⁸;
- 300 (5) specified provisions of the National Assistance Act 1948⁹;
- 301 (6) specified provisions of the Supplementary Benefits Act 1976¹⁰; or
- 302 (7) specified provisions of the Social Security Administration Act 1992¹¹.

Orders made in similar circumstances by courts in Scotland¹² and Northern Ireland¹³ are similarly registrable.

1 'Part of the United Kingdom' means England (which, for these purposes, includes Wales), Scotland or Northern Ireland: see the Maintenance Orders Act 1950 s 28(1), (2). Cf the definition of 'United Kingdom' and the meanings of 'England', 'English' and 'English law' set out in para 4 ante.

2 Ie in accordance with *ibid* Pt II (ss 16-25) (as amended): see para 294 post.

3 *Ibid* s 16(1).

4 *Ibid* s 16(2)(a) (amended by the Matrimonial Causes Act 1973 s 54, Sch 2 para 3(1)(a); the Supplementary Benefits Act 1976 s 35(2), Sch 7 para 13; the Domestic Proceedings and Magistrates' Courts Act 1978 s 89(2)(a), Sch 2 para 13; the Matrimonial and Family Proceedings Act 1984 s 46(1), Sch 1 para 1(a); the Social Security Act 1986 s 86, Sch 10 Pt II para 39; the Family Law Reform Act 1987 s 33, Sch 2 para 12, Sch 3 para 1, Sch 4; the Courts and Legal Services Act 1990 ss 116, 125(7), Sch 16 para 35, Sch 20; and the Social Security (Consequential Provisions) Act 1992 s 4, Sch 2 para 3(1)). The Maintenance Orders Act 1950 s 16(2)(a) has been prospectively amended by the Family Law Act 1996 s 66(1), Sch 8 para 3. At the date at which this volume states the law no day had been appointed for the commencement of the amending provisions. The Lord Chancellor has announced that the Family Law Act 1996 Pt II (ss 2-25) will not be implemented and the relevant provisions of that Act (which include the amendments effected by s 66, Sch 8 Pt I para 3) will be repealed without being brought into force: see 620 HL Official Report (5th series), 16 January 2001, written answers col 126.

5 Ie the Matrimonial Causes Act 1973 ss 22, 23(1), (2), (4), 27 (as amended); and also the predecessor provisions (ie the Matrimonial Causes Act 1965 ss 15-17, 19-22, 30, 34-35 (repealed)): see further para 284 ante.

6 Ie the Matrimonial and Family Proceedings Act 1984 s 14 or s 17: see further para 291 ante.

7 Ie the Domestic Proceedings and Magistrates' Courts Act 1978 Pt I (ss 1-35) (as amended): see further para 285 ante.

8 le the Children Act 1989 s 15(1), Sch 1 or s 29(6), Sch 2 para 23: see further para 286 ante.

9 le the National Assistance Act 1948 s 43 (as amended): see further para 287 ante.

10 le the Supplementary Benefits Act 1976 s 18 (repealed).

11 le the Social Security Administration Act 1992 s 106: see further para 287 ante.

12 See the Maintenance Orders Act 1950 s 16(2)(b) (amended by the Social Work (Scotland) Act 1968 s 95(1), Sch 8 para 34; the Guardianship Act 1973 ss 14, 15(3), Sch 5 para 4; the Divorce (Scotland) Act 1976 s 12(1), Sch 1 para 1; the Supplementary Benefits Act 1976 Sch 7 para 13; the Administration of Justice Act 1977 s 3, Sch 3; the Civil Jurisdiction and Judgments Act 1982 s 54, Sch 14; the Social Security and Housing Benefits Act 1982 s 48(5), Sch 4; the Matrimonial and Family Proceedings Act 1984 Sch 1 para 1(b); the Family Law (Scotland) Act 1985 s 28(1), Sch 1 para 3; the Social Security Act 1986 Sch 10 para 39; and the Social Security (Consequential Provisions) Act 1992 Sch 2 para 3(1)).

13 See the Maintenance Orders Act 1950 s 16(2)(c) (amended by the Matrimonial Causes Act 1973 Sch 2 para 3(1)(a); the Social Security Act 1986 s 86, Sch 10 Pt II para 39; the Social Security (Consequential Provisions) Act 1992 s 4, Sch 2 para 3(1); the Supplementary Benefits etc (Consequential Provisions) (Northern Ireland) Order 1977, SI 1977/2158; the Maintenance Orders (Northern Ireland Consequential Amendments) Order 1980, SI 1980/564; the Matrimonial and Family Proceedings (Northern Ireland Consequential Amendments) Order 1989, SI 1989/678, art 2; and the Children (Northern Ireland Consequential Amendments) Order 1995, SI 1995/756, arts 2, 15, Schedule). The Maintenance Orders Act 1950 s 16(2)(c) has been prospectively amended by the Family Law Act 1996 s 66(1), Sch 8 para 3; but see note 4 supra.

UPDATE

293 Orders registrable for enforcement

TEXT AND NOTES 4, 12--1950 Act s 16(2)(a), (b) further amended: Civil Partnership Act 2004 Sch 27 para 18, Health and Social Care Act 2008 Sch 15 Pt 5.

TEXT AND NOTE 13--1950 Act s 16(2)(c) further amended: Civil Partnership Act 2004 Sch 27 para 18.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/B. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS ACT 1950/294. Registration of orders.

294. Registration of orders.

An application for the registration of a maintenance order must be made to the prescribed officer¹ of the court which made the order, except in the case of orders made by a magistrates' court in which case the application is to a justice or justices for the same place as that court². An application must be made in the prescribed manner³ by or on behalf of the person entitled to payments under the order⁴; but where sums are payable under an order of a magistrates' court to or through an officer of the court, that officer must, on the request of the person entitled, make application on that person's behalf⁵.

If it appears that the person liable to make payments under the order resides in another part of the United Kingdom⁶, and that it is convenient that the order should be enforceable there, the authority to whom application was made must send a certified copy of the order to the prescribed officer of the corresponding court in that part of the United Kingdom⁷. On receipt of the certified copy, that officer must register it in that court and give notice of the registration to the officer of the court which made the order⁸, who must register the notice of registration⁹. The certified copy must be accompanied by an affidavit or statutory declaration by the applicant, or a certificate of the officer to or through whom payments are required to be made, as to the amount of any arrears due to the applicant¹⁰.

1 As to the prescribed officer see the Family Proceedings Rules 1991, SI 1991/1247, rr 1.2(1), 7.19(1), 7.20(1).

2 Maintenance Orders Act 1950 s 17(1).

3 As to the prescribed manner see the Family Proceedings Rules 1991, SI 1991/1247, rr 7.19, 7.20. See also the Maintenance Orders Act 1950 (Summary Jurisdiction) Rules 1950, SI 1950/2035, r 2 (amended by SI 1980/1895; SI 2001/615).

4 Maintenance Orders Act 1950 s 17(1), (2).

5 See *ibid* s 17(6). The person entitled is under the same liability for costs as if the application was made by him: s 17(6).

6 For the meaning of 'part of the United Kingdom' see para 293 note 1 *ante*.

7 Maintenance Orders Act 1950 s 17(2). In the case of an order made by a superior court, the certified copy is sent to the clerk of the Court of Session in Scotland or the chief registrar of the Queen's Bench Division (Matrimonial) of the High Court of Justice in Northern Ireland: s 17(3)(a); Family Proceedings Rules 1991, SI 1991/1247, rr 7.18, 7.19(2). However, see r 7.19(6) as to county court orders. In any other case, the certified copy is sent to a court of summary jurisdiction in Northern Ireland or the sheriff court in Scotland within the area of which the defendant appears to be: see the Maintenance Orders Act 1950 s 17(3)(b).

8 *Ibid* s 17(4). For details as to the registers used, and of entries in the court minutes, see the Family Proceedings Rules 1991, SI 1991/1247, rr 7.18, 7.19(3), (6). See also the Maintenance Orders Act 1950 (Summary Jurisdiction) Rules 1950, SI 1950/2035, r 2(4) (amended by SI 1980/1895; SI 2001/615).

9 Maintenance Orders Act 1950 s 17(5). See note 8 *supra*.

10 See *ibid* s 20(1). The affidavit, declaration or certificate is evidence of the facts stated in it: s 20(2).

UPDATE

294 Registration of orders

TEXT AND NOTE 2--For 'for the same place' read 'acting in the same local justice area': 1950 Act s 17(1) (amended by the Courts Act 2003 Sch 8 para 87).

NOTES 3, 8--SI 1950/2035 r 2 further amended: SI 2005/617.

NOTE 7--1950 Act s 17(3)(a) amended: Constitutional Reform Act 2005 Sch 11 para 19(2) (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/B. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS ACT 1950/295. Effect of registration.

295. Effect of registration.

A maintenance order registered in a court in any part of the United Kingdom¹ may be enforced in that part of the United Kingdom in all respects as if it had been made by that court and as if that court had had jurisdiction to make it; and proceedings for or with respect to the enforcement of the order may be taken accordingly². However, no court in England³ in which an order is registered under Part II of the Maintenance Orders Act 1950⁴ may enforce that order to the extent that it is for the time being registered in another court in England under Part I of the Maintenance Orders Act 1958⁵. No proceedings other than those provided for in the Maintenance Orders Act 1950 may be taken for or with respect to the enforcement of the order while it is so registered⁶.

Every maintenance order registered in a magistrates' court in England is enforceable as if it were a magistrates' court maintenance order⁷.

1 For the meaning of 'part of the United Kingdom' see para 293 note 1 ante.

2 Maintenance Orders Act 1950 s 18(1).

3 This includes Wales: see para 293 note 1 ante. See also para 4 ante.

4 Ie the Maintenance Orders Act 1950 Pt II (ss 16-25) (as amended).

5 Ie the Maintenance Orders Act 1958 Pt I (ss 1-5) (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 664 et seq): Maintenance Orders Act 1950 s 18(3A) (added by the Administration of Justice Act 1977 s 3, Sch 3 para 6; and amended by the Civil Jurisdiction and Judgments Act 1982 s 37(1), Sch 11 paras 1, 5).

6 Maintenance Orders Act 1950 s 18(6). An order registered in a court of summary jurisdiction in England does not carry interest, but interest may be carried by orders registered in the High Court under the Maintenance Orders Act 1958 Pt I (as amended), or the Civil Jurisdiction and Judgments Act 1982 s 36 (Northern Ireland only): Maintenance Orders Act 1950 s 18(1A) (added by the Civil Jurisdiction and Judgments Act 1982 Sch 11 paras 1, 5).

7 Maintenance Orders Act 1950 s 18(2) (substituted by the Family Law Reform Act 1987 s 33(1), Sch 2 para 13; and amended by the Maintenance Enforcement Act 1991 s 10, Sch 1 para 3). In relation to payment orders, the Magistrates' Courts Act 1980 ss 76, 93 (both as amended) (see MAGISTRATES vol 29(2) (Reissue) paras 829, 831) are modified by the Maintenance Orders Act 1950 s 18(2ZA), (2ZB) (s 18(2ZA), (2ZB) added by the Maintenance Enforcement Act 1991 Sch 1 para 3; and the Maintenance Orders Act 1950 s 18(2ZA) amended by the Access to Justice Act 1999 s 90(1), Sch 13 paras 12, 13(1), (2)). 'Magistrates' court maintenance order' means a maintenance order enforceable by a magistrates' court; and 'maintenance order' means any order specified by the Administration of Justice Act 1970 s 28, Sch 8 (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 642): Magistrates' Courts Act 1980 s 150(1) (see MAGISTRATES vol 29(2) (Reissue) para 820) (definitions added by the Family Law Reform Act 1987 s 33(1), Sch 2 para 88); applied by the Maintenance Orders Act 1950 s 18(2) (as so substituted).

Any person under an obligation to make payments under a maintenance order registered in a court of summary jurisdiction in England must give notice of any change of address to the proper officer of the court, and failure without reasonable excuse to do so is punishable on summary conviction with a fine not exceeding level 2 on the standard scale: s 18(2A) (added by the Matrimonial and Family Proceedings Act 1984 s 46(1), Sch 1 para 2; and amended by the Statute Law (Repeals) Act 1993; the Access to Justice Act 1999 Sch 13 para 13(3); and the Matrimonial and Family Proceedings (Northern Ireland Consequential Amendments) Order 1989, SI 1989/678, art 42(1), Sch 2).

'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal

Justice Act 1988 s 170(1), Sch 15 para 58); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Powers of Criminal Courts (Sentencing) Act 2000 s 128; and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 144.

UPDATE

295 Effect of registration

NOTE 7--1950 Act s 18(2ZA) amended: Courts Act 2003 Sch 8 para 88(2).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/B. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS ACT 1950/296. Collection of sums payable.

296. Collection of sums payable.

Where a maintenance order made in England¹ by a court of summary jurisdiction is registered in any court², any requirement of the court by which sums payable under the order are to be paid through or to any officer or person on behalf of the person entitled is of no effect so long as the order is registered³.

Where a maintenance order is registered in a court of summary jurisdiction, the court must order that all payments to be made under the order (including any arrears accrued before registration) must be made through the collecting officer of the court or the collecting officer of some other magistrates' court in England⁴. Such an order may be varied or revoked by a subsequent order⁵.

Where payments under a maintenance order cease to be, or become, payable through or to any officer or person, the person liable to make the payments, until he is given the prescribed notice⁶ to that effect, is deemed to comply with the maintenance order if he makes payments as he was required to do under that order and under any order as to payment of which he has had notice⁷.

1 This includes Wales: see para 293 note 1 ante. See also para 4 ante.

2 Ie under the Maintenance Orders Act 1950 Pt II (ss 16-25) (as amended): see paras 293-295 ante.

3 Ibid ss 19(1), 28(1).

4 Ibid s 19(2) (amended by the Maintenance Enforcement Act 1991 s 11(1), Sch 2 para 4).

5 Maintenance Orders Act 1950 s 19(3) (substituted by the Maintenance Enforcement Act 1991 s 10, Sch 1 para 4).

6 As to the prescribed notice see the Maintenance Orders Act 1950 (Summary Jurisdiction) Rules 1950, SI 1950/2035, r 13 (amended by SI 1980/1895; SI 2001/615).

7 Maintenance Orders Act 1950 s 19(4).

UPDATE

296 Collection of sums payable

NOTE 6--SI 1950/2035 r 13 further amended: SI 2005/617.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/B. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS ACT 1950/297. Discharge and variation of orders registered in superior courts.

297. Discharge and variation of orders registered in superior courts.

The registration of a maintenance order in a superior court¹ does not confer on that court any power to vary or discharge the order, or affect any jurisdiction of the court in which the order was made to vary or discharge the order². Where a maintenance order made in Scotland is registered under certain statutory provisions³, the person liable to make payments under the order may, on application made to that court in the prescribed manner⁴, adduce any evidence on which he would be entitled to rely in proceedings before the court which made the order for the variation or discharge of the order⁵. The court before which the evidence is adduced must transmit a transcript or summary, signed by the deponent, to the court in Scotland, and in proceedings in that court for variation or discharge of the order the transcript or summary will be evidence of the facts stated in it⁶.

1 Ie under the Maintenance Orders Act 1950 Pt II (ss 16-25) (as amended): see paras 293-295 ante.

2 Ibid s 21(1).

3 Ie under ibid Pt II (as amended), the Civil Jurisdiction and Judgments Act 1982 s 36, or the Maintenance Orders Act 1958 Pt I (ss 1-5) (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 664 et seq): see the Maintenance Orders Act 1950 s 21(2) (amended by the Civil Jurisdiction and Judgments Act 1982 s 36(6), Sch 12 Pt III para 1(3)).

4 As to the prescribed manner see the Family Proceedings Rules 1991, SI 1991/1247, r 7.20(3) (amended by SI 1997/1893); and the Maintenance Orders Act 1950 (Summary Jurisdiction) Rules 1950, SI 1950/2035, r 9A (added by SI 1980/1895).

5 Maintenance Orders Act 1950 s 21(2).

6 Ibid s 21(2), (3).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/B. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS ACT 1950/298. Discharge and variation of orders registered in inferior courts.

298. Discharge and variation of orders registered in inferior courts.

Where a maintenance order is for the time being registered in a magistrates' court in England¹, or a court of summary jurisdiction in Northern Ireland or a sheriff court in Scotland, then, upon application² made by or on behalf of the person liable to make or entitled to periodical payments, that court may by order make such variation as it thinks fit in the rate of payments within the maximum rate, if any, authorised by the law of that part of the United Kingdom³ in which the maintenance order was made⁴.

If the court is satisfied that payment has not been made in accordance with the order, the court may vary it by exercising one of the following powers⁵:

- 303 (1) the power to order that payments be made directly to a justices' chief executive in England⁶;
- 304 (2) the power to order that payments be made directly to a justices' chief executive, by a method of payment specified by statute⁷; or
- 305 (3) the power to make an attachment of earnings order⁸.

In deciding which of these powers to exercise the court must have regard to any representations made by the person liable⁹.

Where the court proposes to exercise its power under head (2) above and, having given the debtor¹⁰ an opportunity of opening an account from which payments may be made in accordance with the method of payment proposed to be ordered, the court is satisfied that he has failed without reasonable excuse to do so, it may order that he open such an account¹¹.

Where a magistrates' court has made a maintenance order and payments under it are required to be made as indicated in head (2) above, an interested party¹² may apply in writing to the clerk of the court which made the order for the order to be varied¹³. On such an application the clerk may, after giving written notice to any other interested party¹⁴ and allowing that party to make written representations within 14 days, vary the order to provide that payments are to be made in accordance with head (1) above¹⁵. If the clerk considers it inappropriate to exercise this power, he may refer the matter to the court which may vary the order by exercising one of its powers under heads (1) to (3) above¹⁶. In deciding which such power to exercise the court must have regard to any representations made by the debtor¹⁷. Where the court proposes to exercise its power under head (2) above and, having given the debtor an opportunity of opening an account from which payments may be made in accordance with the method of payment proposed to be ordered, the court is satisfied that he has failed without reasonable excuse to do so, it may order that he open such an account¹⁸.

For the purposes of the variation of an order, a court in any part of the United Kingdom may take notice of the law in force in any other part of the United Kingdom¹⁹.

Except as described above, no variation may be made in the rate of payments under an order which is registered in a court of summary jurisdiction, but this is without prejudice to the power of the court which made the order to discharge or vary it otherwise than in respect of the rate of payments²⁰.

The prescribed officer of any court by which an order is varied must give notice of the variation to the prescribed officer of any court in which the order is registered and, if it was made by another court, to the prescribed officer of that court²¹.

Where a maintenance order is for the time being registered in a court of summary jurisdiction, the person liable to make or entitled to payments may, on application made in the prescribed manner²² to the court which made the order or the court of registration, adduce in the prescribed manner evidence on which he would be entitled to rely in proceedings for the variation or discharge of the order²³. The court which takes the evidence must transmit a transcript or summary of it, signed by the deponent, to the prescribed officer of the court of registration or the court which made the order, as the case may be; the transcript or summary is evidence of the facts stated in it in any proceedings for variation or discharge²⁴.

1 This includes Wales: see para 293 note 1 ante. See also para 4 ante.

2 For the procedure see the Maintenance Orders Act 1950 (Summary Jurisdiction) Rules 1950, SI 1950/2035, r 8.

3 For the meaning of 'part of the United Kingdom' see para 293 note 1 ante.

4 Maintenance Orders Act 1950 s 22(1) (amended by the Domestic Proceedings and Magistrates' Courts Act 1978 s 89, Sch 2 para 14). As to service of process see the Maintenance Orders Act 1950 s 15 (as amended), applied by s 22(3); and para 288 ante.

5 Ibid s 22(1A) (s 22(1A)-(1E) added by the Maintenance Enforcement Act 1991 s 10, Sch 1 para 5).

6 Maintenance Orders Act 1950 s 22(1B)(a) (as added (see note 5 supra); and s 22(1B)(a), (b) amended by the Access to Justice Act 1999 s 90(1), Sch 13 para 14(2)).

7 I.e. falling within the Magistrates' Courts Act 1980 s 59(6) (as substituted) (see MAGISTRATES vol 29(2) (Reissue) para 820): Maintenance Orders Act 1950 s 22(1B)(b) (as added and amended: see notes 5-6 supra)

8 I.e. an order under the Attachment of Earnings Act 1971 (see MAGISTRATES vol 29(2) (Reissue) para 839 et seq): Maintenance Orders Act 1950 s 22(1B)(c) (as added: see note 5 supra).

9 Ibid s 22(1C) (as added: see note 5 supra).

10 'Debtor' means the person required under a magistrates' court order to pay money periodically to another, and that other person is known as the 'creditor': Magistrates' Courts Act 1980 ss 59(1), 60(11) (ss 59, 60 substituted by the Maintenance Enforcement Act 1991 ss 2, 4; Magistrates' Courts Act 1980 s 60(4)-(11) applied (in some cases with modifications) by the Maintenance Orders Act 1950 s 22(1E) (as added (see note 5 supra); amended by the Access to Justice Act 1999 Sch 13 paras 12, 14(1), (3), Sch 15).

11 Magistrates' Courts Act 1980 s 59(4) (as substituted: see note 10 supra); applied and modified by the Maintenance Orders Act 1950 s 22(1D) (as added: see note 5 supra).

12 'Interested party' means the debtor or the creditor: Magistrates' Courts Act 1980 s 60(7) (as substituted, applied and modified: see note 10 supra).

13 Ibid s 60(4) (as substituted, applied and modified: see note 10 supra).

14 The clerk may proceed with an application notwithstanding that an interested party has not received written notice of it: ibid s 60(6) (as substituted and applied: see note 10 supra).

15 Ibid s 60(5) (as substituted, applied and modified (see note 10 supra); and amended by the Access to Justice Act 1999 Sch 13 paras 95, 101).

16 Magistrates' Courts Act 1980 s 60(8) (as substituted, applied and modified: see note 10 supra).

17 Ibid s 60(9) (substituted for the purpose of its application to these provisions by the Maintenance Orders Act 1950 s 22(1E) (as added and amended: see note 10 supra)).

18 Magistrates' Courts Act 1980 s 59(4) (substituted by the Maintenance Enforcement Act 1991 s 2; applied and modified by the Magistrates' Courts Act 1980 s 60(10) (substituted for the purposes of its application by these provisions by the Maintenance Orders Act 1950 s 22(1E) (as added and amended: see note 10 supra))).

19 Maintenance Orders Act 1950 s 22(2).

20 Ibid s 22(4).

21 Ibid s 23(1) (s 23 substituted by the Administration of Justice Act 1977 s 3, Sch 3 para 8). As to the prescribed officers see the Family Proceedings Rules 1991, SI 1991/1247, rr 1.2(1), 7.19(4), 7.20(4); and the Maintenance Orders Act 1950 (Summary Jurisdiction) Rules 1950, SI 1950/2035, rr 4, 10 (both amended by SI 1980/1895; SI 2001/615). An officer to whom the notice is given must register the particulars in the manner prescribed by the rules: Maintenance Orders Act 1950 s 23(2) (as so substituted).

22 As to the prescribed manner see the Maintenance Orders Act 1950 (Summary Jurisdiction) Rules 1950, SI 1950/2035, rr 3, 8, 9 (rr 3, 9 amended by SI 2001/615).

23 Maintenance Orders Act 1950 s 22(5)(a).

24 Ibid s 22(5)(b). For proof of transcripts and summaries see s 26(1); and para 289 ante.

UPDATE

298 Discharge and variation of orders registered in inferior courts

NOTE 6--1950 Act s 22(1B) further amended: Courts Act 2003 Sch 8 para 89(2).

NOTES 13-15--1980 Act s 60(4), (5) amended: 2003 Act Sch 8 para 211(4).

NOTE 17--1950 Act s 22(1E) amended: 2003 Act Sch 8 para 89(3).

NOTE 18--1980 Act s 60(10) amended: 2003 Act Sch 8 para 211(4).

NOTE 21--SI 1950/2035 rr 4, 10 further amended: SI 2005/617.

NOTE 22--SI 1950/2035 rr 3, 9 further amended: SI 2005/617.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/B. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS ACT 1950/299. Cancellation of registration.

299. Cancellation of registration.

At any time while a maintenance order is registered in any court¹, an application for the cancellation of the registration may be made in the prescribed manner to the prescribed officer of that court² by or on behalf of the person entitled to payments under the order, and on such an application that officer must, unless proceedings for variation of the order are pending in that court, cancel the registration, whereupon the order ceases to be registered in that court³.

If the court of registration is a magistrates' court and has made an order for payment through a collecting officer⁴, that officer must, if the person entitled to the payments so requests, make the application on behalf of that person⁵.

Where an application is made, by or on behalf of a person liable to make payments under a maintenance order registered in a magistrates' court in England⁶ or a court of summary jurisdiction in Northern Ireland or a sheriff court in Scotland, to the same authority to whom application for registration can be made⁷, and it appears to that authority that the person liable under the order has ceased to reside in England, Northern Ireland or Scotland, as the case may be, that authority may cause a notice to that effect to be sent to the prescribed officer of the court of registration, who must cancel the registration, whereupon the order ceases to be registered in that court⁸.

Orders for payment through collecting officers⁹ cease to have effect on the cancellation of the registration of a maintenance order, but the person liable is deemed to comply with the maintenance order if he continues to make payments to the collecting officer until he receives notice of the cancellation¹⁰. The cancellation does not otherwise affect anything done in relation to the maintenance order while it was registered¹¹.

Similar provisions apply in respect of means of payment orders¹².

1 Ie under the Maintenance Orders Act 1950 Pt II (ss 16-25) (as amended): see paras 293-295 ante.

2 As to the prescribed manner and the prescribed officers see the Family Proceedings Rules 1991, SI 1991/1247, rr 7.19(5), 7.20(5); and the Maintenance Orders Act 1950 (Summary Jurisdiction) Rules 1950, SI 1950/2035, r 11 (amended by SI 1980/1895; SI 2001/615).

3 Maintenance Orders Act 1950 s 24(1).

4 As to such orders see para 296 ante.

5 See the Maintenance Orders Act 1950 s 24(6).

6 England includes Wales: see para 293 note 1 ante. See also para 4 ante.

7 As to these authorities see the Maintenance Orders Act 1950 s 17(1); and para 294 ante.

8 Ibid s 24(2) (amended by the Administration of Justice Act 1977 Sch 3 para 9). See also the Maintenance Orders Act 1950 (Summary Jurisdiction) Rules 1950, SI 1950/2035, r 5 (amended by SI 2001/615) and the Maintenance Orders Act 1950 (Summary Jurisdiction) Rules 1950, SI 1950/2035, r 12 (amended by SI 1980/895; SI 2001/615).

The prescribed officer must send notice of the cancellation to the prescribed officer of the court which made the order and of any court in which the order is registered (ie registered under the Maintenance Orders Act 1958 Pt I (ss 1-5) (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 664 et seq) or the Civil

Jurisdiction and Judgments Act 1982 s 36 (Northern Ireland only): Maintenance Orders Act 1950 s 24(3) (amended by the Administration of Justice Act 1977 s 3, Sch 3 para 9; and the Civil Jurisdiction and Judgments Act 1982 s 36(6), Sch 12 Pt III para 1(4)); Maintenance Orders Act 1950 (Summary Jurisdiction) Rules 1950, SI 1950/2035, r 6 (amended by SI 1980/1895; SI 2001/615). On receipt of such a notice, the prescribed officer of the court which made the order must register particulars of the notice, and the prescribed officer of any court in which it is registered must register the notice and cancel the registration: Maintenance Orders Act 1950 s 24(3A) (added by the Administration of Justice Act 1977 Sch 3 para 9); Maintenance Orders Act 1950 (Summary Jurisdiction) Rules 1950, SI 1950/2035, r 12A (added by SI 1980/1895; amended by SI 2001/615).

9 See para 296 ante.

10 See the Maintenance Orders Act 1950 s 24(5).

11 Ibid s 24(4).

12 See *ibid* s 24(5A) (added by the Maintenance Enforcement Act 1991 s 10, Sch 1 para 6; and amended by the Access to Justice Act 1999 s 90(1), Sch 13 para 15). 'Means of payment orders' refers to orders made under the Maintenance Orders Act 1950 s 18(2ZA) (as added), s 22(1A) (as added), s 22(1E) (as added) or the Magistrates' Courts Act 1980 s 59(6) (as substituted) (see paras 295, 298 ante; and *MAGISTRATES* vol 29(2) (Reissue) para 820): see the Maintenance Orders Act 1950 s 24(5A) (as so added).

UPDATE

299 Cancellation of registration

NOTE 2--SI 1950/2035 r 11 further amended: SI 2005/617.

NOTE 8--SI 1950/2035 rr 5, 6, 12, 12A further amended: SI 2005/617.

NOTE 12--1950 Act s 24(5A) further amended: Courts Act 2003 Sch 8 para 90.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/B. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS ACT 1950/300. Evidence of maintenance orders.

300. Evidence of maintenance orders.

For the purposes of the registration of maintenance orders under the Maintenance Orders Act 1950 for enforcement in other parts of the United Kingdom¹, the register of a magistrates' court, or any document purporting to be an extract from the register and to be certified by the justices' chief executive as a true extract, is admissible as evidence of the maintenance order registered in it². A certificate purporting to be signed by the justices' chief executive for a magistrates' court, and stating that no minute or memorandum of an order cancelling the registration of, or varying, a maintenance order is entered in the register, is evidence that the registration of the order has not been cancelled or the order varied³.

1 See paras 293-299 ante. For the meaning of 'part of the United Kingdom' see para 293 note 1 ante.

2 See the Magistrates' Courts Rules 1981, SI 1981/552, r 68 (amended by SI 2001/610).

3 See the Magistrates' Courts Rules 1981, SI 1981/552, r 69 (amended by SI 1989/384; SI 2001/610); and MAGISTRATES.

UPDATE

300 Evidence of maintenance orders

TEXT AND NOTE 2--SI 1981/552 r 68 replaced by Criminal Procedure Rules 2005, SI 2005/384 ('CrimPR'), r 6.4. Reference to justices' chief executive is now to magistrates' court officer: CrimPR 6.4.

TEXT AND NOTE 3--Words 'any document purporting to be' and 'and to be' omitted; reference to justices' chief executive is now to designated officer: SI 1981/552 r 69 (amended by SI 2002/1236, SI 2005/617, SI 2005/2930).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/C. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (FACILITIES FOR ENFORCEMENT) ACT 1920/301. Application of the Maintenance Orders (Facilities for Enforcement) Act 1920.

C. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (FACILITIES FOR ENFORCEMENT) ACT 1920

301. Application of the Maintenance Orders (Facilities for Enforcement) Act 1920.

The Maintenance Orders (Facilities for Enforcement) Act 1920¹ provides for the reciprocal enforcement of maintenance orders² made in England³ or Northern Ireland⁴ and maintenance orders made in certain parts of Her Majesty's dominions outside the United Kingdom⁵.

1 The Maintenance Orders (Facilities for Enforcement) Act 1920 (and the Maintenance Orders Act 1958 s 19: see note 5 infra) will be wholly repealed when the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 22(2)(a), (c) is brought into force by order under s 49(2). At the date at which this volume states the law, no such order had been made.

2 For this purpose, 'maintenance order' means an order (other than an order of affiliation) for the periodical payment of sums of money towards the maintenance of the wife or other dependants of the person against whom the order is made, and 'dependants' means such persons as that person is liable to maintain according to the law in force in that part of Her Majesty's dominions in which the maintenance order was made: Maintenance Orders (Facilities for Enforcement) Act 1920 s 10; *Harris v Harris* [1949] 2 All ER 318, DC; *Collister v Collister* [1972] 1 All ER 334, [1972] 1 WLR 54, DC. As to Her Majesty's dominions see COMMONWEALTH vol 13 (2009) PARA 707.

3 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 See the Irish Free State (Consequential Adaptation of Enactments) Order 1923, SR & O 1923/405, by which references to Ireland in Acts passed prior to that instrument are taken to be references to Northern Ireland.

5 Her Majesty may by Order in Council extend the Maintenance Orders (Facilities for Enforcement) Act 1920 to any part of Her Majesty's dominions or to any British protectorate where reciprocal provisions have been made: s 12. There are no longer any British protectorates: see COMMONWEALTH vol 13 (2009) PARA 708. Such an Order in Council may be revoked or varied by a further Order in Council: Maintenance Orders Act 1958 s 19.

At the date at which this volume states the law, the Maintenance Orders (Facilities for Enforcement) Act 1920 extends to Antigua and Barbuda, Australia, The Bahamas, Belize, Botswana, certain parts of Canada (Prince Edward Island, the Yukon Territory), Cayman Islands, Cyprus, Dominica, The Gambia, Grenada, Guernsey, Guyana, Jamaica, Jersey, Kiribati, Lesotho, Malawi, Malaysia, Mauritius, Montserrat, Nigeria, St Christopher and Nevis, St Lucia, St Vincent and the Grenadines, Seychelles, Sierra Leone, Solomon Islands, Sri Lanka, Swaziland, Tanzania, Trinidad and Tobago, Tuvalu, Uganda, Virgin Islands, Zambia and Zimbabwe: Maintenance Orders (Facilities for Enforcement) Order 1959, SI 1959/377 (amended by the Pakistan Act 1973 s 4(4); SI 1974/557; SI 1975/2188; SI 1979/166; SI 1983/1124; SI 2002/789); Zimbabwe Act 1979 s 5(2), Sch 2 para 3 (s 5(2) amended by the British Nationality Act 1981 s 52(8), Sch 9).

UPDATE

301 Application of the Maintenance Orders (Facilities for Enforcement) Act 1920

NOTE 5--1920 Act no longer extends to Jersey: SI 1959/377 (amended by SI 2008/1203).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/C. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (FACILITIES FOR ENFORCEMENT) ACT 1920/302. Transmission of maintenance orders made in England.

302. Transmission of maintenance orders made in England.

Where a court in England¹ has made a maintenance order² and it is proved to the court that the person against whom the order was made is resident in any part of Her Majesty's dominions outside the United Kingdom to which the Maintenance Orders (Facilities for Enforcement) Act 1920 extends³, the court must send to the Lord Chancellor⁴ for transmission to the governor of that part a certified copy⁵ of the order⁶.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 For the meaning of 'maintenance order' see para 301 note 2 ante.

3 See para 301 note 5 ante. As to Her Majesty's dominions see COMMONWEALTH vol 13 (2009) PARA 707. For the meaning of 'United Kingdom' see para 4 ante.

4 The functions formerly exercised by the Secretary of State under the Maintenance Orders (Facilities for Enforcement) Act 1920 were transferred to the Lord Chancellor by the Transfer of Functions (Magistrates Courts and Family Law) Order 1992, SI 1992/709, art 4(1), (2). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

5 'Certified copy' means a copy certified by the proper officer of the court to be a true copy: Maintenance Orders (Facilities for Enforcement) Act 1920 s 10.

6 Ibid s 2. As to the prospective repeal of the Act see para 301 note 1 ante. For the procedure in respect of High Court orders see the Family Proceedings Rules 1991, SI 1991/1247, rr 7.17(2)-(5).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/C. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (FACILITIES FOR ENFORCEMENT) ACT 1920/303. Provisional orders made by magistrates' courts.

303. Provisional orders made by magistrates' courts.

Where an application is made to a magistrates' court in England¹ for a maintenance order² against a person, and it is proved that the person is resident in a part of Her Majesty's dominions outside the United Kingdom to which the Maintenance Orders (Facilities for Enforcement) Act 1920 extends³, then if, in the absence of that person, the court is satisfied, after hearing the evidence⁴, of the justice of the application, it may make any such order as it might have made if that person had been resident in England, had received reasonable notice of the hearing of the application, and had failed to appear at the hearing; but the order is provisional only and is of no effect unless and until it is confirmed by a competent court in the part of Her Majesty's dominions concerned⁵.

Where an order is made the court must send to the Lord Chancellor⁶ for transmission to the governor of the part of Her Majesty's dominions concerned any depositions taken⁷ and a certified copy⁸ of the order, together with a statement of the grounds on which the making of the order might have been opposed if the person against whom it is made had been resident in England, had received reasonable notice of the hearing and had appeared at it, and such information as the court possesses for facilitating the identification of the person and ascertaining his whereabouts⁹.

Where any provisional order has come for confirmation before a court in a part of the dominions to which the Act extends, and has been remitted to the magistrates' court which made it for the purpose of taking further evidence, that court or any other magistrates' court for the same commission area¹⁰ must, after the prescribed notice, take evidence in the same way as on the original application. If it appears to the court that the order ought not to have been made, it may revoke¹¹ the order, but in any other case the depositions must be sent to the Lord Chancellor and dealt with as the original depositions¹².

The confirmation of the order does not affect the power of a magistrates' court to revoke or vary it, but a variation does not have effect until confirmed¹³.

The applicant has the same right of appeal, if any, against a refusal to make a provisional order as he would have had if the person against whom the order is sought to be made had been resident in England and received reasonable notice of the date of the hearing of the application¹⁴.

1 It is not necessary for the person against whom the order is sought to have been resident at any time within the United Kingdom, nor for the cause of complaint to have arisen there: *Collister v Collister* [1972] 1 All ER 334, [1972] 1 WLR 54, DC; cf para 285 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 For the meaning of 'maintenance order' see para 301 note 2 ante.

3 See para 301 note 5 ante. As to Her Majesty's dominions see COMMONWEALTH vol 13 (2009) PARA 707. For the meaning of 'United Kingdom' see para 4 ante.

4 The evidence of any witness who is examined on such application must be put into writing, and the deposition must be read over to and signed by him: Maintenance Orders (Facilities for Enforcement) Act 1920 s 3(2). As to the prospective repeal of the Act see para 301 note 1 ante.

5 Ibid s 3(1) (amended by the Maintenance Orders (Reciprocal Enforcement) Act 1992 s 1(1), Sch 1 para 1(1), (2)). See also the Maintenance Orders (Facilities for Enforcement) Rules 1922, SR & O 1922/1355 (amended by SI 1970/762; SI 1989/384; SI 1992/457; SI 1993/617; SI 2000/1875; 2001/615).

6 As to the transfer of functions to the Lord Chancellor see para 302 note 4 ante. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

7 See note 4 supra.

8 For the meaning of 'certified copy' see para 302 note 5 ante.

9 Maintenance Orders (Facilities for Enforcement) Act 1920 s 3(3) (amended by the Maintenance Orders (Reciprocal Enforcement) Act 1992 Sch 1 para 1(3)).

10 Is a commission area within the meaning of the Justices of the Peace Act 1997: see MAGISTRATES vol 29(2) (Reissue) para 507.

11 'Revoke' includes discharge: Maintenance Orders (Facilities for Enforcement) Act 1920 s 3(8) (added by the Maintenance Orders (Reciprocal Enforcement) Act 1992 Sch 1 para 1(7)).

12 Maintenance Orders (Facilities for Enforcement) Act 1920 s 3(4) (amended by the Domestic Proceedings and Magistrates' Courts Act 1978 s 89(2)(a), Sch 2 para 2; the Justices of the Peace Act 1979 s 71, Sch 2 para 1; the Maintenance Orders (Reciprocal Enforcement) Act 1992 s 1(1), Sch 1 para 1(4); and the Access to Justice Act 1999 s 106, Sch 15 Pt V(1)).

13 Maintenance Orders (Facilities for Enforcement) Act 1920 s 3(5) (amended by the Maintenance Orders (Reciprocal Enforcement) Act 1992 Sch 1 para 1(5)). The varying or revoking order must be transmitted in the same manner as the original order, and a varying order is subject to the same confirmation as the original order: Maintenance Orders (Facilities for Enforcement) Act 1920 s 3(5) (as so amended).

14 Ibid s 3(6) (amended by the Maintenance Orders (Reciprocal Enforcement) Act 1992 Sch 1 para 1(6)).

The Magistrates' Courts Act 1980 s 60(1) (as substituted) (revocation and variation of orders for periodical payment) (see MAGISTRATES vol 29(2) (Reissue) para 823) is modified in its application to orders confirmed under the Maintenance Orders (Facilities for Enforcement) Act 1920 s 3 (as amended): s 3(7) (added by the Maintenance Orders (Reciprocal Enforcement) Act 1992 Sch 1 para 1(7)).

UPDATE

303 Provisional orders made by magistrates' courts

NOTE 5--SR & O 1922/1355 further amended: SI 2005/617.

TEXT AND NOTE 10--Words 'for the same commission area' omitted: Maintenance Orders (Facilities for Enforcement) Act 1920 s 3(4) (amended by the Courts Act 2003 Sch 8 para 68, Sch 10). Commission areas replaced by local justice areas: see s 8.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/C. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (FACILITIES FOR ENFORCEMENT) ACT 1920/304. Registration in England of overseas order.

304. Registration in England of overseas order.

Where a maintenance order¹ has been made against any person by a court in any part of Her Majesty's dominions outside the United Kingdom to which the Maintenance Orders (Facilities for Enforcement) Act 1920 extends² and a certified copy³ has been transmitted by the governor to the Lord Chancellor⁴, the Lord Chancellor must send a copy of the order, if it was made by a court of superior jurisdiction, to the senior district judge, or, if the order was made by a court which was not a court of superior jurisdiction, to the justices' chief executive of the English magistrates' court for the division or district where the defendant is living, for registration in the prescribed manner⁵.

The registration of the order appears to be an administrative act initiated by the Lord Chancellor, and the party against whom the order to be registered was made has no right to be heard to show cause against the registration, nor does the fact that on registration the order becomes an order of the court give him the right to appeal either from the order itself or from its registration⁶.

1 For the meaning of 'maintenance order' see para 301 note 2 ante.

2 See para 301 note 5 ante. As to Her Majesty's dominions see COMMONWEALTH vol 13 (2009) PARA 707. For the meaning of 'United Kingdom' see para 4 ante.

3 For the meaning of 'certified copy' see para 302 note 5 ante. As to proof of documents signed by officers of courts overseas see the Maintenance Orders (Facilities for Enforcement) Act 1920 s 8. As to the prospective repeal of the Act see para 301 note 1 ante.

4 As to the transfer of functions to the Lord Chancellor see para 302 note 4 ante. As to the Lord Chancellor CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

5 Maintenance Orders (Facilities for Enforcement) Act 1920 s 1(1), (2) (s 1(2) amended by the Administration of Justice Act 1970 s 1(6), Sch 2 para 2); Supreme Court Act 1981 s 61, Sch 1. For the procedure see the Family Proceedings Rules 1991, SI 1991/1247, r 7.17; and the Maintenance Orders (Facilities for Enforcement) Rules 1922, SR & O 1922/1355, r 1 (amended by SI 2000/1875; SI 2001/615), and the Maintenance Orders (Facilities for Enforcement) Rules 1922, SR & O 1922/1355, r 3 (amended by SI 2001/615). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

6 *Pilcher v Pilcher* [1955] P 318 at 331, [1955] 2 All ER 644 at 652, DC. See para 309 note 4 post.

UPDATE

304 Registration in England of overseas order

NOTE 5--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

SR & O 1922/1355 rr 1, 3 further amended: SI 2005/617.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/C. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (FACILITIES FOR ENFORCEMENT) ACT 1920/305. Confirmation by magistrates' courts of overseas provisional orders.

305. Confirmation by magistrates' courts of overseas provisional orders.

Where a maintenance order¹ has been made by a court in a part of Her Majesty's dominions outside the United Kingdom to which the Maintenance Orders (Facilities for Enforcement) Act 1920 extends² and:

- 306 (1) the order is provisional only and has no effect unless and until confirmed by a magistrates' court in England³; and
- 307 (2) a certified copy⁴ of the order together with the depositions of witnesses⁵ and a statement of the grounds on which the order might have been opposed has been transmitted to the Lord Chancellor⁶ and it appears to him that the person against whom the order was made is resident in England,

he may send the documents to the justices' chief executive of the magistrates' court within whose area the defendant is living⁷ with a requisition that a notice be served upon the person of the time and place of the hearing and informing him that he may attend to show cause why the order should not be confirmed⁸.

It is open to the person on whom the notice is served to oppose the confirmation of the order on any grounds on which he might have opposed the making of the order in the original proceedings had he been a party to them, but on no other grounds⁹. If he fails to appear or, on appearing, fails to satisfy the court that the order should not be confirmed, the court may confirm the order with or without modification¹⁰.

On confirming a provisional order, the court must, having regard to any representations by the person liable to make payments under the order¹¹, exercise one of the following powers¹²:

- 308 (a) the power to order that payments be made directly to a justices' chief executive¹³;
- 309 (b) the power to order that payments be made directly to a justices' chief executive, by a method of payment specified by statute¹⁴; and
- 310 (c) the power to make an attachment of earnings order¹⁵.

Where the court proposes to exercise its power under head (b) above and, having given the debtor¹⁶ an opportunity of opening an account from which payments may be made in accordance with the method of payment proposed to be ordered, the court is satisfied that he has failed without reasonable excuse to do so, it may order that he open such an account¹⁷.

If the defendant satisfies the court at the hearing that for the purposes of any defence it is necessary to remit the case to the court which made the provisional order for the taking of further evidence, the magistrates' court may so remit the case and adjourn the proceedings for the purpose¹⁸.

Where a provisional order has been confirmed, it may be varied or rescinded in like manner as if it had originally been made by the confirming court¹⁹, which may remit the case to the court of origin for further evidence as necessary, and adjourn the proceedings for the purpose²⁰.

Where a provisional order has been confirmed, the person bound by it has the same right of appeal, if any, against the confirmation of the order as he would have had against the making of the order had the order been an order of the court confirming it²¹.

- 1 For the meaning of 'maintenance order' see para 301 note 2 ante.
- 2 See para 301 note 5 ante. As to Her Majesty's dominions see COMMONWEALTH vol 13 (2009) PARA 707. For the meaning of 'United Kingdom' see para 4 ante.
- 3 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.
- 4 For the meaning of 'certified copy' see para 302 note 5 ante.
- 5 Depositions taken in a court in a part of Her Majesty's dominions outside the United Kingdom to which the Maintenance Orders (Facilities for Enforcement) Act 1920 extends may be received in evidence before magistrates courts: s 9. As to the prospective repeal of the Act see para 301 note 1 ante.
- 6 As to the transfer of functions to the Lord Chancellor see para 302 note 4 ante. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.
- 7 See the Maintenance Orders (Facilities for Enforcement) Act 1920 s 10; and the Maintenance Orders (Facilities for Enforcement) Rules 1922, SR & O 1922/1355, rr 1-3 (amended by SI 2000/1875; SI 2001/615).
- 8 Maintenance Orders (Facilities for Enforcement) Act 1920 s 4(1) (amended by the Maintenance Orders (Reciprocal Enforcement) Act 1992 s 1, Sch 1 para 2(1), (2)). A notice required to be served under the Maintenance Orders (Facilities for Enforcement) Act 1920 s 4 (as amended) may be served by post: s 4(2) (substituted by the Maintenance Orders (Reciprocal Enforcement) Act 1992 Sch 1 para 2(3)).
- 9 Maintenance Orders (Facilities for Enforcement) Act 1920 s 4(3) (amended by the Maintenance Orders (Reciprocal Enforcement) Act 1992 Sch 1 para 2(4)). The certificate of the court which made the provisional order, stating the grounds on which the order might have been opposed, is conclusive evidence that these grounds are available (Maintenance Orders (Facilities for Enforcement) Act 1920 s 4(3) (as so amended)), but the defendant may oppose the confirmation on grounds not included in the statement if they would have been available in the original proceedings (*Re Wheat* [1932] 2 KB 716, DC; *Harris v Harris* [1949] 2 All ER 318, DC).
- 10 Maintenance Orders (Facilities for Enforcement) Act 1920 s 4(4) (amended by the Maintenance Orders (Reciprocal Enforcement) Act 1992 Sch 1 para 2(5)). For the procedure after the hearing see the Maintenance Orders (Facilities for Enforcement) Rules 1922, SR & O 1922/1355, r 4.
- 11 Maintenance Orders (Facilities for Enforcement) Act 1920 s 4(5C) (s 4(5A)-(5D) added by the Maintenance Enforcement Act 1991 s 10, Sch 1 para 1).
- 12 Maintenance Orders (Facilities for Enforcement) Act 1920 s 4(5A) (as added: see note 11 supra).
- 13 Ibid s 4(5B)(a) (as added (see note 11 supra); and s 4(5B)(a), (b) amended by the Access to Justice Act 1999 s 90(1), Sch 13 para 7(2)).
- 14 Ie falling within the Magistrates' Courts Act 1980 s 59(6) (as substituted) (see MAGISTRATES vol 29(2) (Reissue) para 820): Maintenance Orders (Facilities for Enforcement) Act 1920 s 4(5B)(b) (as added and amended: see notes 11, 13 supra).
- 15 Ie under the Attachment of Earnings Act 1971 (see MAGISTRATES vol 29(2) (Reissue) para 839 et seq): Maintenance Orders (Facilities for Enforcement) Act 1920 s 4(5B)(c) (as added: see note 11 supra).
- 16 For the meaning of 'debtor' see para 298 note 10 ante.
- 17 Magistrates' Courts Act 1980 s 59(4) (substituted by the Maintenance Enforcement Act 1991 s 2); applied and modified by the Maintenance Orders (Facilities for Enforcement) Act 1920 s 4(5D) (as added: see note 11 supra).
- 18 Ibid s 4(5) (amended by the Maintenance Orders (Reciprocal Enforcement) Act 1992 Sch 1 para 2(6)).
- 19 Maintenance Orders (Facilities for Enforcement) Act 1920 s 4(6) (substituted by the Maintenance Enforcement Act 1991 Sch 1 para 1(2)). See *Pilcher v Pilcher* [1955] P 318, [1955] 2 All ER 644, DC. The variation or revocation of an order by a magistrates' court must be in accordance with the Magistrates' Courts Act 1980 s 60 (as substituted and modified): see the Maintenance Orders (Facilities for Enforcement) Act 1920 s

4(6A) (s 4(6A), (6B) added by the Maintenance Enforcement Act 1991 Sch 1 para 1(2); and the Maintenance Orders (Facilities for Enforcement) Act 1920 s 4(6A) amended by the Maintenance Orders (Reciprocal Enforcement) Act 1992 Sch 1 para 2(7); and the Access to Justice Act 1999 Sch 13 para 7(3), Sch 15 Pt V(7)).

20 Maintenance Orders (Facilities for Enforcement) Act 1920 s 4(6B) (as added: see note 19 *supra*).

21 *Ibid* s 4(7). As to appeals against the making of a maintenance order see the Domestic Proceedings and Magistrates' Courts Act 1978 s 29 (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 900).

UPDATE

305 Confirmation by magistrates' courts of overseas provisional orders

NOTE 7--SR & O 1922/1355 rr 1, 3 further amended: SI 2005/617.

NOTE 10--SR & O 1922/1355 r 4 amended: SI 2005/617.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/C. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (FACILITIES FOR ENFORCEMENT) ACT 1920/306. Variation and revocation of maintenance orders.

306. Variation and revocation of maintenance orders.

Where, on an application for the variation or revocation¹ of a relevant maintenance order², the respondent is residing in a part of Her Majesty's dominions outside the United Kingdom to which the Maintenance Orders (Facilities for Enforcement) Act 1920 extends³, a magistrates' court in England⁴ has jurisdiction to hear the application if it would have had jurisdiction had the respondent been residing in England⁵. Where the respondent to such an application does not appear at the time and place appointed for the hearing of the application by a magistrates' court in England, and the court is satisfied that he is residing in a part of Her Majesty's dominions outside the United Kingdom to which the Act extends, the court may proceed to hear and determine the application at the time and place appointed for the hearing or any adjourned hearing as if the respondent had so appeared⁶.

1 'Revocation' includes discharge: Maintenance Orders (Facilities for Enforcement) Act 1920 s 4A(6) (s 4A added by the Maintenance Orders (Reciprocal Enforcement) Act 1992 s 1(1), Sch 1 para 3).

2 Ie any maintenance order made by virtue of the Maintenance Orders (Facilities for Enforcement) Act 1920 s 3 (as amended) which has been confirmed as mentioned in s 3 (see para 303 ante), and any maintenance order confirmed under s 4 (as amended) (see para 305 ante): s 4A(1) (as added: see note 1 supra). As to the prospective repeal of the Act see para 301 note 1 ante. For the meaning of 'maintenance order' see para 301 note 2 ante.

3 See para 301 note 5 ante. As to Her Majesty's dominions see COMMONWEALTH vol 13 (2009) PARA 707. For the meaning of 'United Kingdom' see para 4 ante.

4 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

5 Maintenance Orders (Facilities for Enforcement) Act 1920 s 4A(2) (as added: see note 1 supra).

6 Ibid s 4A(4) (as added: see note 1 supra).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/C. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (FACILITIES FOR ENFORCEMENT) ACT 1920/307. Application of the Magistrates' Courts Act 1980.

307. Application of the Magistrates' Courts Act 1980.

The Magistrates' Courts Act 1980¹ applies to proceedings before magistrates' courts under the Maintenance Orders (Facilities for Enforcement) Act 1920². Proceedings for the making or confirmation of provisional maintenance orders by magistrates' courts are family proceedings for the purposes of the Magistrates' Courts Act 1980³.

1 The Maintenance Orders (Facilities for Enforcement) Act 1920 refers to the Summary Jurisdiction Acts. These Acts (as defined in the Interpretation Act 1889 s 13(7) (repealed)) were largely repealed and replaced by the Magistrates' Courts Act 1952 which is now consolidated in the Magistrates' Courts Act 1980: see MAGISTRATES vol 29(2) (Reissue) para 583.

2 See the Maintenance Orders (Facilities for Enforcement) Act 1920 s 7(1) (amended by the Justices of the Peace Act 1949 s 46(2), Sch 7 Pt II; so numbered by the Maintenance Orders (Reciprocal Enforcement) Act 1992 s 1(1), Sch 1 para 4). See generally MAGISTRATES. In particular, rules made under the Magistrates' Courts Act 1980 s 144 (see MAGISTRATES vol 29(2) (Reissue) para 588) may include provision which falls within the Children Act 1989 s 93(2) (as amended) and which may be made in relation to relevant proceedings within s 93 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 207): Maintenance Orders (Facilities for Enforcement) Act 1920 s 7(2) (added by the Maintenance Orders (Reciprocal Enforcement) Act 1992 Sch 1 para 4). As to the prospective repeal of the Maintenance Orders (Facilities for Enforcement) Act 1920 see para 301 note 1 ante.

3 Magistrates' Courts Act 1980 s 65(1)(a), (2) (amended by the Children Act 1989 s 92(11), Sch 11 para 8). Proceedings for the variation of any provision for the payment of money contained in a provisional order made or confirmed by a magistrates' court are not domestic proceedings: Magistrates' Courts Act 1980 s 65(1)(ii).

UPDATE

307 Application of the Magistrates' Courts Act 1980

NOTE 2--1920 Act s 7(2) further amended: Courts Act 2003 Sch 8 para 70.

NOTE 3--1980 Act s 65(1) further amended: Courts Act 2003 Sch 8 para 214.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/C. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (FACILITIES FOR ENFORCEMENT) ACT 1920/308. Payment and collection of money.

308. Payment and collection of money.

Where a maintenance order¹ is registered in a magistrates' court², the court must order that payments due under the order are to be made to the justices' chief executive³.

As regards an order which has been or is being so registered, or a provisional order which has been or is being confirmed⁴, where a magistrates' court orders that payments are to be made by a particular means⁵, the justices' chief executive must record on the copy of the order the means of payment ordered by the court and must notify in writing, as soon as practicable, the person liable⁶. Where the court orders payment to the clerk of that or another court of summary jurisdiction⁷, the justices' chief executive to whom payments are to be made must give to the person liable details of the account into which the payments should be made⁸. Where the justices' chief executive receives an application from an interested party⁹ for the variation of the means of payment, he must notify in writing, as soon as practicable, that party and (where practicable) any other interested party of the result of the application¹⁰.

Where an order has been registered or a provisional order confirmed, the justices' chief executive to whom payments are to be made must collect the monies due under the order as if it were a magistrates' court maintenance order¹¹, and may take proceedings in his own name for enforcing payment¹². He must send the monies collected to the court from which the order originally issued, or such other person or authority as that court directs¹³.

1 For the meaning of 'maintenance order' see para 301 note 2 ante.

2 I.e. under the Maintenance Orders (Facilities for Enforcement) Act 1920 s 1 (as amended): see para 304 ante.

3 Maintenance Orders (Facilities for Enforcement) Rules 1922, SR & O 1922/1355, r 5 (substituted by SI 1992/457; and amended by SI 2001/615).

4 I.e. registered under the Maintenance Orders (Facilities for Enforcement) Act 1920 s 1 (as amended) (see para 304 ante), or confirmed under s 4 (as amended) (see para 305 ante): Maintenance Orders (Facilities for Enforcement) Rules 1922, SR & O 1922/1355, r 5A(1) (r 5A added by SI 1992/457).

5 I.e. under the Maintenance Orders (Facilities for Enforcement) Rules 1922, SR & O 1922/1355, r 5 (as substituted), or under the Maintenance Orders (Facilities for Enforcement) Act 1920 s 4(5A) (as added), s 4(6A) (as added) or s 6(2) (as amended) (see paras 305 ante, 309 post).

6 See the Maintenance Orders (Facilities for Enforcement) Rules 1922, SR & O 1922/1355, r 5A(2) (as added (see note 4 supra); and amended by SI 2001/615).

7 I.e. by a method falling within the Magistrates' Courts Act 1980 s 59(6) (as substituted) (see MAGISTRATES vol 29(2) (Reissue) para 820).

8 See the Maintenance Orders (Facilities for Enforcement) Rules 1922, SR & O 1922/1355, r 5A(3) (as added (see note 4 supra); and amended by SI 2001/615).

9 I.e. an application under the Magistrates' Courts Act 1980 s 60(4) (as substituted and modified): see para 305 note 19 ante. For the meaning of 'interested party' see para 298 note 12 ante.

10 See the Maintenance Orders (Facilities for Enforcement) Rules 1922, SR & O 1922/1355, r 5A(4) (as added (see note 4 supra); and amended by SI 2001/615).

11 For the meaning of 'magistrates' court maintenance order' see para 295 note 7 ante.

12 See the Maintenance Orders (Facilities for Enforcement) Rules 1922, SR & O 1922/1355, r 6 (amended by SI 1970/762; SI 1989/384; SI 1992/457; SI 2001/615).

13 See the Maintenance Orders (Facilities for Enforcement) Rules 1922, SR & O 1922/1355, r 6 (as amended: see note 12 supra).

UPDATE

308 Payment and collection of money

TEXT AND NOTES--References to the justices' chief executive are now to the designated officer: SR & O 1922/1355 (amended by SI 2005/617).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/C. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (FACILITIES FOR ENFORCEMENT) ACT 1920/309. Enforcement of orders registered or confirmed in England.

309. Enforcement of orders registered or confirmed in England.

Where the order of an overseas court has been registered¹ in England², then from the date of registration the order is of the same force and effect, and (subject to the special provisions of the Maintenance Orders (Facilities for Enforcement) Act 1920³) all proceedings may be taken on the order, as if it had been originally obtained in the court in which it was registered; and the court has power to enforce the order accordingly⁴.

If an order which has been registered in a magistrates' court or confirmed by such a court is of such a nature that, if made by the magistrates court, it would be enforceable in like manner as a magistrates' court maintenance order⁵, the order is, subject to certain special provisions, so enforceable⁶. Subject to those special provisions, every such order is enforceable as if the order were for the payment of a civil debt recoverable summarily⁷. A warrant of distress or commitment issued by a magistrates' court for the purpose of enforcing an order so registered or confirmed may be executed in any part of the United Kingdom⁸ in the same manner as if the warrant had been originally issued or subsequently indorsed by a magistrates' court having jurisdiction in the place where the warrant is executed⁹.

1 See para 304 ante.

2 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 Eg those provisions considered in the text and notes 5-9 infra.

4 Maintenance Orders (Facilities for Enforcement) Act 1920 s 1(1). That provision is limited to enforcement and does not enable complaints to be maintained for the variation or discharge of registered orders: *Pilcher v Pilcher* [1955] P 318, [1955] 2 All ER 644, DC; *R v Rose, ex p McGibbon* (1959) 123 JP 374, DC. The court may, however, remit arrears due under the order: *Pilcher v Pilcher (No 2)* [1956] 1 All ER 463, [1956] 1 WLR 298, DC. As to the prospective repeal of the Maintenance Orders (Facilities for Enforcement) Act 1920 see para 301 note 1 ante.

5 For the meaning of 'magistrates' court maintenance order' see para 295 note 7 ante.

6 The special provisions are modifications of the Magistrates' Courts Act 1980 ss 76, 93 (both as amended) (see MAGISTRATES vol 29(2) (Reissue) paras 829, 831) specified in the Maintenance Orders Act 1950 s 18(2ZA) (as added and amended) and s 18(2ZB) (as added): Maintenance Orders (Facilities for Enforcement) Act 1920 s 6(2) proviso (amended by the Family Law Reform Act 1987 s 33(1), Sch 2 para 1; and the Maintenance Enforcement Act 1991 s 10, Sch 1 para 2).

7 Maintenance Orders (Facilities for Enforcement) Act 1920 s 6(2). The court and its officers must take all such steps as may be prescribed for enforcing the order, and the justices' chief executive to whom payments are directed to be made may take proceedings in his own name: s 6(1); Maintenance Orders (Facilities for Enforcement) Rules 1922, SR & O 1922/1355, r 6 (as amended); and see para 308 ante.

8 For the meaning of 'United Kingdom' see para 4 ante.

9 Maintenance Orders (Facilities for Enforcement) Act 1920 s 6(3).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(a) Enforcement under Part I/310. Application of the Act.

D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972

(

310. Application of the Act.

If satisfied that reciprocal provision for the enforcement of maintenance orders¹ will be made in the country concerned, Her Majesty may provide by Order in Council for the designation of that country as a reciprocating country for the purposes of Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972². The provisions of that Act may be applied with modifications and adaptations to other countries designated by Order in Council³.

1 For the purposes of the Maintenance Orders (Reciprocal Enforcement) Act 1972 Pt I (ss 1-24) (as amended), 'maintenance order' means:

- 119 (1) an order (including an affiliation order or order consequent upon an affiliation order) which provides for the payment of a lump sum or the making of periodical payments towards the maintenance (including, in the case of a child, education: s 21(3)) of any person, being a person whom the person liable to make payments under the order is, according to the law applied in the place where the order was made, liable to maintain (s 21(1) (definition amended by the Civil Jurisdiction and Judgments Act 1982 s 37(1), Sch 11 para 4(2)); and
- 120 (2) an affiliation order or order consequent upon an affiliation order providing for the payment by the person adjudged, found or declared to be a child's father of expenses incidental to the child's birth or, where the child has died, of his funeral expenses (Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1)).

In the case of a maintenance order which has been varied, it means that order as varied: s 21(1). 'Affiliation order' means an order, however described, adjudging, finding or declaring a person to be the father of a child, whether or not it also provides for the maintenance of the child: s 21(1).

In its application to particular countries, the Act may only extend to certain classes of maintenance orders falling within this definition: see note 2 *infra*.

2 See *ibid* s 1(1). Accordingly, 'reciprocating country' means a country designated as such by an Order in Council made under s 1: s 1(1). Where the designation of a country is as regards particular classes of maintenance order (see *infra*), the country is a reciprocating country only as regards maintenance of such classes: s 1(2).

Such an Order in Council may be varied or revoked by a subsequent Order in Council, which may contain such incidental, consequential and transitional provisions as seem expedient: s 45(1). An Order in Council is subject to annulment in pursuance of a resolution of either House of Parliament: s 45(2). It may designate a country as a reciprocating country as regards maintenance orders generally, or as regards maintenance orders other than those of any specified class, or as regards specified classes of orders only: see s 1(2)). It may contain special provisions as regards a reciprocating country to which the Maintenance Orders (Facilities for Enforcement) Act 1920 applies: see the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 24. As to maintenance orders registered under the Maintenance Orders (Facilities for Enforcement) Act 1920 see the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 23 (amended by the Access to Justice Act 1999 s 90(1), Sch 13 para 78(3)). As to the replacement of the regime under the Maintenance Orders (Facilities for Enforcement) Act 1920 with that provided by the Maintenance Orders (Reciprocal Enforcement) Act 1972 see para 301 note 1 *ante*.

The following countries are designated as reciprocating countries to various extents: Anguilla; the Australian States of the Australian Capital Territory, Norfolk Island and the Northern Territory; Barbados; Bermuda; Brunei Darussalam; the Canadian Provinces of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and

Labrador (formerly known as Newfoundland), Nova Scotia, Ontario, Saskatchewan, and the Northwest Territories; the Falkland Islands and Dependencies; Fiji; Ghana; Gibraltar; Hong Kong; India; the Isle of Man; Kenya; Malta; Nauru; New Zealand; Nunavut; Papua New Guinea; St Helena; Singapore; South Africa; Tanzania (but excluding Zanzibar); the Turks and Caicos Islands; and Zimbabwe: see the Reciprocal Enforcement of Maintenance Orders (Designation of Reciprocating Countries) Order 1974, SI 1974/556 (amended by SI 1975/2187; SI 1979/115; and SI 1983/1125); the Reciprocal Enforcement of Maintenance Orders (Designation of Reciprocating Countries) Order 1979, SI 1979/115; the Reciprocal Enforcement of Maintenance Orders (Designation of Reciprocating Countries) Order 1983, SI 1983/1125; the Reciprocal Enforcement of Maintenance Orders (Designation of Reciprocating Countries) Order 2001, SI 2001/3501; and the Reciprocal Enforcement of Maintenance Orders (Designation of Reciprocating Countries) Order 2002, SI 2002/778.

3 See the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 40.

This power has been exercised in respect of the Republic of Ireland: Recovery of Maintenance (Republic of Ireland) Order 1993, SI 1993/594 (amended by SI 2001/410). For the procedure see the Family Proceedings Rules 1991, SI 1991/1247, r 7.37 (amended by SI 1996/816) and the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) (Republic of Ireland) Rules 1975, SI 1975/286 (amended by SI 1992/457; SI 1993/617; SI 2001/615).

The power has been exercised in respect of the United States: Recovery of Maintenance (United States of America) Order 1993, SI 1993/591; Reciprocal Enforcement of Maintenance Orders (United States of America) Order 1995, SI 1995/2709 (amended by SI 2001/410); Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) (United States of America) Rules 1995, SI 1995/2802. See also the Magistrates' Courts (Recovery Abroad of Maintenance) Rules 1975, SI 1975/488 (amended by SI 1980/1584; SI 1993/617; SI 2001/615).

The power has been exercised in respect of a group of states party to the Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations (Hague, 2 October 1973; TS 49 (1980); Cmnd 7939): Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1993, SI 1993/593 (amended by SI 1994/1902; SI 1999/1318; SI 2001/410; SI 2001/2567; SI 2002/2838). See also the Family Proceedings Rules 1991, SI 1991/1247, r 7.38 (amended by SI 1996/816); and the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) (Hague Convention Countries) Rules 1980, SI 1980/108 (amended by SI 1986/1962; SI 1992/457; SI 1993/617; SI 1999/2002; SI 2001/615). The countries in the group are Australia; the Czech Republic; Denmark; Estonia; Finland; France; Germany; Italy; Luxembourg; the Netherlands (and Antilles); Norway; Poland; Portugal; Slovakia; Spain; Sweden; Switzerland; and Turkey.

UPDATE

310 Application of the Act

NOTE 2--Jersey is now also designated as a reciprocating country: see the Reciprocal Enforcement of Maintenance Orders (Designation of Reciprocating Countries) Order 2008, SI 2008/1202.

NOTE 3--SI 1975/286 further amended: SI 2005/617. SI 1993/591 superseded by the Recovery of Maintenance (United States of America) Order 2007, SI 2007/2006. SI 1995/2709 superseded by the Reciprocal Enforcement of Maintenance Orders (United States of America) Order 2007, SI 2007/2005. SI 1995/2802 amended: SI 2007/2267. SI 1975/488 further amended: SI 1993/594, SI 2007/2267. SI 1980/108, SI 1993/593, SI 1993/594 further amended: SI 2005/617.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(a) Enforcement under Part I/311. Transmission of English maintenance orders.

311. Transmission of English maintenance orders.

Where the payer¹ under a maintenance order² made by a court in the United Kingdom³ is residing or has assets in a reciprocating country⁴, the payee⁵ under the order may apply⁶ for the order to be sent to that country for enforcement⁷. If the prescribed officer of the court is satisfied that the payer is residing or has assets in a reciprocating country, that officer must send specified documents to the Lord Chancellor⁸, namely:

- 311 (1) a certified copy⁹ of the order¹⁰;
- 312 (2) a certificate signed by the officer that the order is enforceable in the United Kingdom¹¹;
- 313 (3) a certificate of arrears¹² so signed¹³;
- 314 (4) a statement giving such information as the officer possesses as to the whereabouts of the payer and the nature and location of his assets¹⁴;
- 315 (5) a statement giving such information as the officer possesses for facilitating the identification of the payer¹⁵; and
- 316 (6) where available, a photograph of the payer¹⁶.

The Lord Chancellor must forward these documents to the responsible authority¹⁷ in the reciprocating country if he is satisfied that the statement under head (4) above gives sufficient information to justify that being done¹⁸.

The transmission of an order under these provisions does not affect the jurisdiction of the court which made the order to enforce, vary or revoke it¹⁹.

1 'Payer' means the person liable to make payments under the order: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1).

2 For the meaning of 'maintenance order' see para 310 note 1 ante. For these purposes, a provisional order or an order made under *ibid* Pt II (ss 25-39) (as amended) (see paras 323-334 post) is excluded: s 2(2).

3 For the meaning of 'United Kingdom' see para 4 ante.

4 For the meaning of 'reciprocating country' see para 310 note 2 ante.

5 'Payee' means the person entitled to payments under the order: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1).

6 Every application must be made in the prescribed manner to the prescribed officer of the court which made the order: *ibid* s 2(3). 'Prescribed' means prescribed by magistrates' courts rules under the Magistrates' Courts Act 1980 s 144 (as amended) (see *MAGISTRATES* vol 29(2) (Reissue) para 588) or, as the case may be, by rules of court: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1) (definition amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 107). For any purpose of the Maintenance Orders (Reciprocal Enforcement) Act 1972 Pt I (ss 1-24) (as amended) in relation to a magistrates' court the prescribed officer is the justices' clerk: Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 3. As to the prescribed officer in other courts see the Family Proceedings Rules 1991, SI 1991/1247, rr 1.2, 7.31. As to the prescribed manner see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 4 (amended by SI 1986/1962); and the Family Proceedings Rules 1991, SI 1991/1247, r 7.31.

7 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 2(1) (amended by the Civil Jurisdiction and Judgments Act 1982 s 37(1), Sch 11 para 9).

8 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 2(4). The functions formerly exercised by the Secretary of State under the Maintenance Orders (Reciprocal Enforcement) Act 1972 were transferred to the Lord Chancellor by the Transfer of Functions (Magistrates' Courts and Family Law) Order 1992, SI 1992/709, art 4(3). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

9 'Certified copy', in relation to an order, means a copy of the order certified by the proper officer to be a true copy: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1).

10 Ibid s 2(4)(a).

11 Ibid s 2(4)(b).

12 'Certificate of arrears', in relation to a maintenance order, means a certificate that the sum specified is, to the best of the information or belief of the certifying officer, the amount of the arrears due under the order at the date of the certificate, or, as the case may be, that to the best of his information and belief there are no such arrears due at that date: ibid s 21(1).

13 Ibid s 2(4)(c).

14 Ibid s 2(4)(d) (amended by the Civil Jurisdiction and Judgments Act 1982 Sch 11 para 9).

15 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 2(4)(e).

16 Ibid s 2(4)(f).

17 'Responsible authority', in relation to a reciprocating country, means any person who in that country has functions similar to those of the Lord Chancellor under ibid Pt I (as amended): s 21(1).

18 Ibid s 2(4).

19 Ibid s 2(5). As to variation and revocation see para 313 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(a) Enforcement under Part I/312. Provisional orders made by magistrates' courts.

312. Provisional orders made by magistrates' courts.

Where an application is made to a magistrates' court for a maintenance order¹ against a person residing in a reciprocating country², and the court would have jurisdiction to determine that application³ if that person were residing in England⁴ and received reasonable notice of the date of the hearing of the application, the court has jurisdiction to determine the application⁵ and make a provisional maintenance order⁶. If the provisional order is confirmed by a court in a reciprocating country, it is to be treated for all purposes as if the court had made it in the form in which it was confirmed and as if it had never been a provisional order; accordingly, that court has jurisdiction to enforce, vary or revoke it⁷.

Where a court makes a provisional order, the following documents must be sent to the Lord Chancellor⁸, namely:

- 317 (1) a certified copy⁹ of the order¹⁰;
- 318 (2) a document, authenticated in the prescribed manner¹¹, setting out or summarising the evidence given in the proceedings¹²;
- 319 (3) a certificate signed by the prescribed officer¹³ certifying that the grounds stated in it are the grounds on which the making of the order might have been opposed by the payer¹⁴;
- 320 (4) a statement giving such information as was available to the court as to the whereabouts of the payer¹⁵;
- 321 (5) a statement giving such information as the clerk possesses for facilitating the identification of the payer¹⁶; and
- 322 (6) where available, a photograph of the payer¹⁷.

The Lord Chancellor must forward these documents to the responsible authority¹⁸ in the reciprocating country in which the payer is residing if he is satisfied that the statement under head (4) above gives sufficient information to justify that being done¹⁹.

No appeal lies from a provisional order made under these provisions²⁰.

1 For the meaning of 'maintenance order' see para 310 note 1 ante.

2 For the meaning of 'reciprocating country' see para 310 note 2 ante.

3 Ie under the Domestic Proceedings and Magistrates' Courts Act 1978 or the Children Act 1989.

4 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

5 Provisions requiring or enabling the transfer of proceedings from a magistrates' court to a county court or the High Court, or requiring or enabling a magistrates' court to refuse to make an order on the ground that the matter would be more conveniently dealt with by the High Court, are excluded: see the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 3(4) (substituted by the Maintenance Orders (Reciprocal Enforcement) Act 1992 s 1(2), Sch 1 para 6(3)).

6 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 3(1), (2) (s 3(1) substituted by the Maintenance Orders (Reciprocal Enforcement) Act 1992 Sch 1 para 6(2)). For the procedure see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, rr 4A, 4C, Sch A1 (all added by SI

1993/617; and the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 4A amended by SI 2001/615). A 'provisional order' in this context is an order made by a court in the United Kingdom which is provisional only and of no effect unless and until it is confirmed, with or without alteration, by a competent court in the reciprocating country: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1). 'Court' includes any tribunal or person having power to make, confirm, enforce, vary or revoke a maintenance order: s 21(1).

7 Ibid s 3(6). As to revocation see para 313 post.

8 Ibid s 3(5). As to the transfer of functions to the Lord Chancellor see para 311 note 8 ante. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

9 For the meaning of 'certified copy' see para 311 note 9 ante.

10 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 3(5)(a).

11 The document must be authenticated by a certificate signed by one of the justices before whom the evidence was given: Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 5.

12 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 3(5)(b).

13 As to the prescribed officer see para 311 note 6 ante.

14 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 3(5)(c). For the meaning of 'payer' see para 311 note 1 ante.

15 Ibid s 3(5)(d).

16 Ibid s 3(5)(e).

17 Ibid s 3(5)(f).

18 For the meaning of 'responsible authority' see para 311 note 17 ante.

19 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 3(5).

20 Ibid s 12(1).

UPDATE

312 Provisional orders made by magistrates' courts

NOTE 6--SI 1974/668 r 4A further amended, Sch A1 amended: SI 2005/617.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(a) Enforcement under Part I/313. Variation and revocation of orders made in England.

313. Variation and revocation of orders made in England.

Where an English court has made a maintenance order¹ which has been transmitted to a reciprocating country² for enforcement³, or has made a provisional order⁴ which has been confirmed in the reciprocating country⁵, the court having power to vary the order may do so by way of provisional order subject to confirmation in the reciprocating country⁶. Where the court hearing an application⁷ for variation proposes to grant it by increasing the rate of payment it must do so by a provisional order unless either both the payer⁸ and the payee⁹ appear in the proceedings, or the applicant appears and process has been duly served on the other party¹⁰.

Where a certified copy of a provisional order of the court of a reciprocating country, varying or revoking a maintenance order, is received by the English court, together with a duly authenticated document setting out or summarising the evidence¹¹ given at the proceedings at which the provisional order was made, the court may confirm or refuse to confirm the provisional order¹², and, in the case of a variation, may confirm it with or without alteration¹³.

Where a maintenance order to which the provisions described above apply is varied by an order (including a provisional order which has been confirmed) made by a court in the United Kingdom, or by a competent court in a reciprocating country, the maintenance order has effect as from the date on which the variation is to take effect under the order¹⁴. Where such a maintenance order is revoked by an order made by a court in the United Kingdom or by a competent court in a reciprocating country (including a provisional order made by the court in the reciprocating country which has been confirmed by a court in the United Kingdom), the maintenance order must, as from the date on which the revocation is to take effect under the order, be deemed to have effect except as respects any arrears due at that date¹⁵.

Before a maintenance order which is a provisional order is confirmed, if:

- 323 (1) the English court which made the order receives a duly authenticated document setting out or summarising evidence taken in a reciprocating country for the purpose of proceedings relating to the confirmation of the order; or
- 324 (2) the English court, in compliance with a request of a court in a reciprocating country takes evidence from a person residing in the United Kingdom for the purpose of such proceedings,

the court in the United Kingdom which made the order must consider that evidence and if, having done so, it appears that the order ought not to have been made, that court:

- 325 (a) must in the prescribed manner give the person on whose application the maintenance order was made an opportunity to consider the evidence, to make representations and adduce further evidence; and
- 326 (b) after considering all evidence and representations, may revoke the maintenance order¹⁶.

1 For the meaning of 'maintenance order' see para 310 note 1 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 For the meaning of 'reciprocating country' see para 310 note 2 ante.

3 As to transmission for enforcement see para 311 ante.

4 For the meaning of 'provisional order' see para 312 note 6 ante.

5 See para 312 ante.

6 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 5(1), (2). As to the court having power to vary an order see para 312 text and note 7 ante.

7 For the procedure on such an application see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, rr 4A, 4C, Sch A1 (all added by SI 1993/617; and the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 4A amended by SI 2001/615).

8 For the meaning of 'payer' see para 311 note 1 ante.

9 For the meaning of 'payee' see para 311 note 5 ante.

10 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 5(3).

The Magistrates' Courts Act 1980 s 60(1) (as substituted) (revocation and variation of orders for periodical payment) (see MAGISTRATES vol 29(2) (Reissue) para 823) is modified in its application to orders to which the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 5 (as amended) applies (see the text and notes 1-6 supra): s 5(3A) (added by the Maintenance Orders (Reciprocal Enforcement) Act 1992 s 1(2), Sch 1 para 7(5)).

Where a court in the United Kingdom, under this provision, makes a provisional order varying a maintenance order, the prescribed officer must send in the prescribed manner to the court in the reciprocating country having power to confirm the provisional order, a certified copy of the provisional order, together with a document authenticated in the prescribed manner, setting out or summarising the evidence given in the proceedings: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 5(4). 'Prescribed' means prescribed by magistrates' courts rules under the Magistrates' Courts Act 1980 s 144 (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 588) or, as the case may be, rules of court: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1) (definition amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 107). See the Family Proceedings Rules 1991, SI 1991/1247, rr 7.32, 7.36; and the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, rr 5, 6. For the procedure where variation or revocation is by an order which is not a provisional order see the Family Proceedings Rules 1991, SI 1991/1247, r 7.35 (amended by SI 1996/816); and the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 12(1), (2). As to the prescribed officer see para 311 note 6 ante. For the meaning of 'United Kingdom' see para 4 ante.

11 The courts of the countries must be given the fullest possible information as to the evidence: see *Re McK* (1976) 126 NLJ 890.

12 For the purpose of determining whether the order should be confirmed, the court must proceed as if an application for the variation or revocation of the maintenance order had been made to it: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 5(6).

13 Ibid s 5(5). For the procedure see the Family Proceedings Rules 1991, SI 1991/1247, r 7.33; and the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, rr 4B, 4C, Sch A1 (all added by SI 1993/617; and the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 4B amended by SI 2001/615).

14 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 5(7) (amended by the Domestic Proceedings and Magistrates' Courts Act 1978 s 54(a)). If the varying order was a provisional order, it takes effect as if made in the form in which it was confirmed, and as if it had never been a provisional order: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 5(7) (as so amended).

15 Ibid s 5(8) (amended by the Domestic Proceedings and Magistrates' Courts Act 1978 s 54(b)).

16 See the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 5(9). For the procedure see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 7 (amended by SI 2001/615).

UPDATE

313 Variation and revocation of orders made in England

NOTES 7, 13--SI 1974/668 r 4A further amended, Sch A1 amended: SI 2005/617.

NOTE 10--SI 1974/668 r 12(1), (2) amended: SI 2005/617.

NOTE 16--SI 1974/668 r 7 further amended: SI 2005/617.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(a) Enforcement under Part I/314. Registration of maintenance orders made in reciprocating countries.

314. Registration of maintenance orders made in reciprocating countries.

Where a court¹ in a reciprocating country² makes a maintenance order³ other than a provisional order⁴ which has not been confirmed, but including one which has been confirmed in some other reciprocating country⁵, and a certified copy⁶ of the order is received by the Lord Chancellor⁷ from the responsible authority⁸ in a reciprocating country then, if it appears to him that the payer⁹ is residing or has assets in the United Kingdom¹⁰, he must send the copy to the prescribed officer of the appropriate court¹¹.

That officer must register the order in the prescribed manner¹², unless, after taking such steps as he thinks fit to ascertain whether the payer is residing or has assets within the court's jurisdiction, he is satisfied that the payer is not residing and has no assets within that jurisdiction, in which case he must return the certified copy to the Lord Chancellor with such information as he possesses as to the payer's whereabouts and the nature and location of his assets¹³.

1 See para 312 note 5 ante.

2 For the meaning of 'reciprocating country' see para 310 note 2 ante.

3 For the meaning of 'maintenance order' see para 310 note 1 ante.

4 For the meaning of 'provisional order' see para 312 note 6 ante.

5 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 6(1).

6 For the meaning of 'certified copy' see para 311 note 9 ante. As to the proof of orders see para 321 post.

7 As to the transfer of functions to the Lord Chancellor see para 311 note 8 ante. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

8 For the meaning of 'responsible authority' see para 311 note 17 ante.

9 For the meaning of 'payer' see para 311 note 1 ante.

10 For the meaning of 'United Kingdom' see para 4 ante.

11 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 6(2) (amended by the Civil Jurisdiction and Judgments Act 1982 s 37(1), Sch 11 para 10). 'Appropriate court' means (in England) a magistrates' court within the jurisdiction of which the person in question is residing or has assets: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1) (definition amended by the Civil Jurisdiction and Judgments Act 1982 Sch 11 paras 4, 15). 'Prescribed' means prescribed by magistrates' courts rules under the Magistrates' Courts Act 1980 s 144 (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 588) or, as the case may be, rules of court: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1) (definition amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 107). As to the prescribed officer see para 311 note 6 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

For the procedure where the payer appears not to be resident and to have no assets in the United Kingdom see para 319 post.

12 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 6(3); and see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 8 (amended by SI 2001/615). Where a justices' chief executive registers such an order he must send written notice of registration to the Lord Chancellor: see r 13(1) (amended by SI 2001/615).

The court must order that payment of sums due is to be made to the chief executive for the court, during such times and at such place as the chief executive may direct: see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 9(1) (substituted by SI 1992/457; and amended by SI 2001/615). As to the transmission of those payments by the clerk see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 9(1A) (added by SI 1992/457; and amended by SI 2001/615). Where it appears to the chief executive to whom payments by way of periodical payments under any maintenance order are made that any sums payable under the order are in arrear he may and, if such sums are in arrear to an amount equal to four times the sum payable weekly under the order, he must, whether the payee requests him to do so or not, proceed in his own name for the recovery of the sums due, unless it appears to him that it is unreasonable in the circumstances to do so: Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 9(2) (amended by SI 1986/1962; SI 1992/457; SI 2001/615). The chief executive must take reasonable steps to notify the person to whom payments are due under a registered order of the means of enforcement available in respect of it, including, in an appropriate case, the possibility of registration of the whole or a part of the order in the High Court under the Maintenance Orders Act 1958 Pt I (ss 1-5) (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 664 et seq): Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1985/668, r 9A (added by SI 1986/1962; and amended by SI 2001/615). As to the procedure where a particular means of payment is ordered, and where such means of payment is sought to be varied, see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1985/668, r 9B (added by SI 1992/457; and amended by SI 2001/615). As to the conversion of currency see the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 16.

13 Ibid s 6(4) (amended by the Civil Jurisdiction and Judgments Act 1982 s 37(1), Sch 11 para 10). There is no hearing, and the payer has no right of objection or appeal. Cf *Pilcher v Pilcher* [1955] P 318 at 331, [1955] 2 All ER 644 at 652, DC (decided under the Maintenance Orders (Facilities for Enforcement) Act 1920).

UPDATE

314 Registration of maintenance orders made in reciprocating countries

NOTE 12--SI 1974/668 rr 8, 9, 13(1) further amended: SI 2005/617.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(a) Enforcement under Part I/315. Confirmation by magistrates' courts of provisional maintenance orders.

315. Confirmation by magistrates' courts of provisional maintenance orders.

Where a provisional maintenance order¹ has been made by a court² in a reciprocating country³, and a certified copy⁴ of the order with supporting documents⁵ is received by the Lord Chancellor⁶, then, if it appears to him that the payer is residing in the United Kingdom⁷, he must send the copy and documents to the prescribed officer of the appropriate court⁸. That court must, if the payer establishes any ground on which he might have opposed the making of the order in the proceedings in which the provisional order was made, refuse to confirm the order, and, in any other case, confirm the order with or without such alterations as it thinks reasonable⁹. The statement from the court which made the provisional order as to the grounds on which the making of the order could have been opposed by the payer is conclusive evidence that the payer might have opposed the order on any of those grounds¹⁰, but does not preclude the payer from relying on other defences which would have been open to him in the original proceedings¹¹.

On confirming a provisional order, a magistrates' court must exercise one of a number of powers¹², having regard to any representations by the payer under the order¹³:

- 327 (1) the power to order that payments be made directly to a justices' chief executive¹⁴;
- 328 (2) the power to order that payments be so made by a prescribed method¹⁵; and
- 329 (3) the power to make an attachment of earnings order¹⁶.

Where the court proposes to exercise its power under head (2) above and, having given the debtor¹⁷ an opportunity of opening an account from which payments may be made in accordance with the method of payment proposed to be ordered, the court is satisfied that he has failed without reasonable excuse to do so, it may order that he open such an account¹⁸.

If the court confirms the provisional order, the prescribed officer must register the order in the prescribed manner in the court or, if the court refuses to confirm the order, return the certified copy of the order and the accompanying documents to the Lord Chancellor¹⁹.

1 For the meaning of 'maintenance order' see para 310 note 1 ante. For the meaning of 'provisional order' see para 312 note 6 ante.

2 See para 312 note 5 ante.

3 For the meaning of 'reciprocating country' see para 310 note 2 ante.

4 For the meaning of 'certified copy' see para 311 note 9 ante.

5 Is a duly authenticated document setting out or summarising the evidence given in the proceedings in which the order was made, and a statement of the grounds on which the making of the order might have been opposed by the payer: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 7(2)(a), (b). For the meaning of 'payer' see para 311 note 1 ante.

6 As to the transfer of functions to the Lord Chancellor see para 311 note 8 ante. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

7 For the meaning of 'United Kingdom' see para 4 ante.

8 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 7(1), (2). For the meaning of 'appropriate court' see para 314 note 11 ante. 'Prescribed' means prescribed by magistrates' courts rules under the Magistrates' Courts Act 1980 s 144 (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 588) or, as the case may be, rules of court: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1) (definition amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 107). See the Family Proceedings Rules 1991, SI 1991/1247, rr 7.32, 7.36; and the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, rr 5, 6. As to the prescribed officer see para 311 note 6 ante. As to the procedure see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, rr 4B, 4C, Sch A1 (all added by SI 1993/617; and the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 4B amended by SI 2001/615).

If notice of proceedings for confirmation cannot be duly served on the payer, the officer by whom the certified copy was received must return it and the accompanying documents to the Lord Chancellor with a statement giving such information as he possesses as to the payer's whereabouts: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 7(6) (amended by the Maintenance Orders (Reciprocal Enforcement) Act 1992 s 1(2), Sch 1 para 8(5)). As to the admissibility of the documents as evidence and proof of orders see para 321 post.

9 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 7(2) (amended by the Maintenance Orders (Reciprocal Enforcement) Act 1992 s 1(2), Sch 1 para 8(2)). Where the order is confirmed, the chief executive must give written notice to the court in the reciprocating country: Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 12(4) (amended by SI 2001/615). The payer or payee has the same right of appeal as he would have from the decision of a magistrates' court to make, or refuse to make, a maintenance order: see the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 12(2).

10 Ibid s 7(3) (amended by the Maintenance Orders (Reciprocal Enforcement) Act 1992 Sch 1 para 8(3)).

11 Cf *Re Wheat* [1932] 2 KB 716, DC; *Harris v Harris* [1949] 2 All ER 318, DC (both decisions under the Maintenance Orders (Facilities for Enforcement) Act 1920).

12 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 7(5A) (s 7(5A)-(5D) added by the Maintenance Enforcement Act 1991 s 10, Sch 1 para 12).

13 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 7(5C) (as added: see note 12 supra).

14 Ibid s 7(5B)(a) (as added (see note 12 supra); and amended by the Access to Justice Act 1999 s 90(1), Sch 13 para 72).

15 Ie under the Magistrates' Courts Act s 59(6) (as substituted) (see MAGISTRATES vol 29(2) (Reissue) para 820): Maintenance Orders (Reciprocal Enforcement) Act 1972 s 7(5B)(b) (as added (see note 12 supra); and amended by the Access to Justice Act 1999 Sch 13 para 72).

16 Ie an order under the Attachment of Earnings Act 1971 (see MAGISTRATES vol 29(2) (Reissue) para 839 et seq): Maintenance Orders (Reciprocal Enforcement) Act 1972 s 7(5B)(c) (as added: see note 12 supra).

17 For the meaning of 'debtor' see para 298 note 10 ante.

18 Magistrates' Courts Act 1980 s 59(4) (substituted by the Maintenance Enforcement Act 1991 s 2); applied and modified by the Maintenance Orders (Facilities for Enforcement) Act 1972 s 7(5D) (as added: see note 12 supra).

19 Ibid s 7(5). As to the registration procedure see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 8(2), (3) (r 8(2) amended by SI 2001/615). As to written notice to the Lord Chancellor see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 13(1) (as amended): and para 314 note 12 ante.

UPDATE

315 Confirmation by magistrates' courts of provisional maintenance orders

NOTE 8--SI 1974/668 r 4B further amended, Sch A1 amended: SI 2005/617.

NOTE 9--SI 1974/668 r 12(4) further amended: SI 2005/617.

NOTE 14--1972 Act s 7(5B)(a) further amended: Courts Act 2003 Sch 8 para 151.

NOTE 19--SI 1974/668 rr 8(2), 13(1) further amended: SI 2005/617.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(a) Enforcement under Part I/316. Enforcement of registered orders.

316. Enforcement of registered orders.

A registered order¹ may be enforced as if it had been made by the registering court² and as if that court had had jurisdiction to make it, and proceedings for or with respect to the enforcement of any such order may be taken accordingly³. The order is enforceable as if it were a magistrates' court maintenance order⁴, and the court and its officers must take all prescribed steps for enforcing or facilitating the enforcement of the order⁵.

Sums of money payable under a registered order are payable in accordance with the order as from the date on which they are required to be paid under the provisions of the order⁶, except that a court having power to confirm a provisional order⁷ may specify a later date for this purpose⁸.

In any proceedings for or with respect to the enforcement of a registered order a certificate of arrears sent to the prescribed officer of the court is evidence of the facts stated in it⁹.

Any person obliged to make payments in pursuance of a registered order must give notice of change of address to the appropriate officer of the registering court, and failure without reasonable excuse to do so is punishable on summary conviction with a fine not exceeding level 2 on the standard scale¹⁰.

1 'Registered order' means an order for the time being registered in a court in the United Kingdom under the Maintenance Orders (Reciprocal Enforcement) Act 1972 Pt I (ss 1-24) (as amended); s 21(1). The provisions described in the text and notes infra do not apply to an order for the time being registered in the High Court under the Maintenance Orders Act 1958 Pt I (ss 1-5) (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 664 et seq): Maintenance Orders (Reciprocal Enforcement) Act 1972 s 8(2). For the meaning of 'United Kingdom' see para 4 ante.

2 'Registering court' means the court in which for the time being a registered order is registered: *ibid* s 21(1). The High Court is not the registering court where an order is registered there for enforcement purposes only: *K v M, M and L (Financial Relief: Foreign Orders)* [1998] 2 FLR 59.

3 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 8(1).

4 See *ibid* s 8(4) (substituted by the Family Law Reform Act 1987 s 33(1), Sch 2 para 45). For the meaning of 'magistrates' court maintenance order' see para 295 note 7 ante. In relation to payment orders, the Magistrates' Courts Act 1980 ss 76, 93 (both as amended) (see MAGISTRATES vol 29(2) (Reissue) paras 829, 831) are modified by the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 8(4A), (4B) (s 8(4A), (4B) added by the Maintenance Enforcement Act 1991 s 10, Sch 1 para 13; and the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 8(4A) amended by the Access to Justice Act 1999 s 90(1), Sch 13 para 73(4)).

5 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 8(5) (amended by the Civil Jurisdiction and Judgments Act 1982 s 37(1), Sch 11 para 11). 'Prescribed' means prescribed by magistrates' courts rules under the Magistrates' Courts Act 1980 s 144 (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 588) or, as the case may be, rules of court: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1) (definition amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 107). Payments under a registered order are to be made to the chief executive of the registering court who may proceed in his own name for the recovery of arrears, and must so proceed if the arrears equal four times the sum payable weekly unless it appears to him unreasonable in the circumstances to do so: Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 9 (amended by SI 1992/457; SI 2001/615); Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, rr 9A, 9B (added by SI 1986/1962; and amended by SI 2001/615). As to transmission of sums by the clerk see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 9(1) (substituted by SI 1992/457; and amended by SI

2001/615) and the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 9(1)(A) (added by SI 1992/457; and amended by SI 2001/615).

6 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 8(7) (amended by the Domestic Proceedings and Magistrates' Courts Act 1978 s 54(c)).

7 lie under the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 7 (as amended): see para 315 ante. For the meaning of 'provisional order' see para 312 note 6 ante.

8 See *ibid* s 8(8) (amended by the Domestic Proceedings and Magistrates' Courts Act 1978 s 54). In such a case a maintenance order registered under the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 7 (as amended) is treated as if it had been made in the form in which it was confirmed and as if it had never been a provisional order: s 8(8) (as so amended).

9 *Ibid* s 8(6). For the meaning of 'certificate of arrears' see para 311 note 12 ante. As to the prescribed officer see para 311 note 6 ante.

10 *Ibid* s 8(3) (amended by the Domestic Proceedings and Magistrates' Courts Act 1978 s 89(2)(a), Sch 2 para 33; the Access to Justice Act 1999 Sch 13 para 73(2); and by virtue of the Criminal Justice Act 1982 s 46). 'Appropriate officer' means, in relation to a magistrates' court in England, the justices' chief executive for the court; and, in relation to a court elsewhere, the clerk of the court: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 8(3A) (added by the Access to Justice Act 1999 Sch 13 para 73(3)). As to the standard scale see para 295 note 7 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

UPDATE

316 Enforcement of registered orders

NOTE 4--Maintenance Orders (Reciprocal Enforcement) Act 1972 s 8(4A) further amended: Courts Act 2003 Sch 8 para 152(3).

NOTE 5--SI 1974/668 rr 9, 9A, 9B further amended: SI 2005/617.

NOTE 10--1972 Act s 8(3A) amended: 2003 Act Sch 8 para 152(2).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(a) Enforcement under Part I/317. Variation and revocation of orders registered in England.

317. Variation and revocation of orders registered in England.

The registering court¹, provided that either the payer² or the payee³ is resident in the United Kingdom⁴, has the like power to vary or revoke a registered order⁵ on the application of the payer or payee as if that court had made the order and had had jurisdiction to make it⁶. These powers are not exercisable in relation to so much of a registered order as provides for the payment of a lump sum⁷.

The court may vary a registered order by means of a provisional order⁸, and must do so unless:

- 330 (1) both payer and payee are residing in the United Kingdom⁹; or
- 331 (2) the application is made by the payee¹⁰; or
- 332 (3) the variation is a reduction in the rate of payments made solely on the ground of a change in the financial circumstances of the payer since the order was made or confirmed, and the courts of the reciprocating country¹¹ in which the maintenance order in question was made do not have power under their own law to confirm a provisional order varying maintenance orders¹².

The court may revoke a registered order by means of a provisional order¹³, and must do so unless both payer and payee are residing in the United Kingdom¹⁴. Unless both payer and payee are residing in the United Kingdom, the court considering an application for revocation must apply the law of the reciprocating country in which the registered order was made; but it may make a provisional order if it has reason to believe that the ground on which the application was made is a ground on which the order could be revoked under that law, even if it is not established that it is such a ground¹⁵.

Where the registering court makes a provisional order varying or revoking a registered order, the prescribed officer¹⁶ of the court must send, in prescribed manner, to the court in the reciprocating country, a certified copy¹⁷ of the provisional order together with a document authenticated in the prescribed manner setting out or summarising the evidence given in the proceedings¹⁸. Where such a certified copy and document are received by the registering court, it may confirm the order either without alteration or with such alteration as it thinks reasonable, or refuse to confirm the order¹⁹.

Where a registered order has been varied by an order (including a provisional order which has been confirmed) made by a court in the United Kingdom or a competent court in a reciprocating country, the variation takes effect from the date on which, under the provisions of the order, the variation was to take effect²⁰. Where a registered order has been revoked by an order made by a court in the United Kingdom or a competent court in a reciprocating country (including a provisional order made by the United Kingdom court which has been confirmed by the competent court in a reciprocating country), the registered order ceases to have effect from the date when the revocation is to take effect under the order, except as regards any arrears due at that date²¹.

1 For the meaning of 'registering court' see para 316 note 2 ante.

2 For the meaning of 'payer' see para 311 note 1 ante.

3 For the meaning of 'payee' see para 311 note 5 ante.

4 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 9(1B) (added by the Civil Jurisdiction and Judgments Act 1982 s 37(1), Sch 11 para 12). The prescribed officer's decision as to residency is not a decision susceptible to appeal: *K v M, M and L (Financial Relief: Foreign Orders)* [1998] 2 FLR 59. For the meaning of 'United Kingdom' see para 4 ante.

5 For the meaning of 'registered order' see para 316 note 1 ante.

6 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 9(1)(a). The Magistrates' Courts Act 1980 s 60(1) (as substituted) (revocation and variation of orders for periodical payment) (see MAGISTRATES vol 29(2) (Reissue) para 823) is modified in its application to registered orders: see the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 9(1ZA) (added by the Maintenance Enforcement Act 1991 s 10, Sch 1 para 14; and amended by the Maintenance Orders (Reciprocal Enforcement) Act 1992 s 1(2), Sch 1 para 9; and the Access to Justice Act 1999 s 90(1), Sch 13 para 74, Sch 15 Pt V(7)). For the procedure see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 4A (added by SI 1992/457; and amended by SI 2001/616), the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 4C (added by SI 1992/457), the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 9B (added by SI 1993/617), the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 12(3) (amended by SI 2001/615) and the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, Sch A1 (added by SI 1993/617; and amended by SI 2001/615).

7 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 9(1A) (s 9(1A) added by the Civil Jurisdiction and Judgments Act 1982 Sch 11 para 4(1)).

8 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 9(1)(b). For the meaning of 'provisional order' see para 312 note 6 ante.

9 Ibid s 9(2)(a).

10 Ibid s 9(2)(b).

11 For the meaning of 'reciprocating country' see para 310 note 2 ante.

12 See the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 9(2)(c). For the procedure in connection with a provisional order see s 9(5); and see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, rr 5, 6.

13 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 9(1)(b).

14 Ibid s 9(3). See note 12 supra.

15 See *ibid* s 9(4).

16 'Prescribed' means prescribed by magistrates' courts rules under the Magistrates' Courts Act 1980 s 144 (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 588) or, as the case may be, rules of court: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1) (definition amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 107). As to the prescribed officer see para 311 note 6 ante.

17 For the meaning of 'certified copy' see para 311 note 9 ante.

18 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 9(5).

19 Ibid s 9(6). For the purpose of determining whether a provisional order should be confirmed the court must proceed as if an application for the variation of the registered order had been made to it: s 9(7). The payer has the same right of appeal as he would have from the decision of a magistrates' court to make, or refuse to make, a maintenance order: s 12(3).

20 Ibid s 9(8) (amended by the Domestic Proceedings and Magistrates' Courts Act 1978 s 54(e)). Where the order was a provisional order, the variation takes effect as if the order had been made in the form in which it was confirmed and as if it had never been a provisional order: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 9(8) (as so amended). The prescribed officer must register, in prescribed manner, any order varying a registered order other than a provisional order which has not been confirmed: s 9(10); and see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 8(2), (3) (r 8(2) amended by SI 2001/615).

21 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 9(9) (amended by the Domestic Proceedings and Magistrates' Courts Act 1978 s 54(f)). As to the cancellation of the registration of the order on revocation see the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 10(1); and para 318 post.

UPDATE

317 Variation and revocation of orders registered in England

NOTE 6--Maintenance Orders (Reciprocal Enforcement) Act 1972 s 9(1ZA) further amended: Courts Act 2003 Sch 8 para 153. SI 1974/668 rr 4A, 9B, 12(3), Sch A1 amended: SI 2005/617.

NOTE 20--SI 1974/668 r 8(2) further amended: SI 2005/617.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(a) Enforcement under Part I/318. Cancellation of registration.

318. Cancellation of registration.

Where a registered order¹ is revoked by:

- 333 (1) an order made by the registering court²; or
- 334 (2) a provisional order³ made by that court which has been confirmed by a court in a reciprocating country⁴ and notice of which has been received by the registering court; or
- 335 (3) an order made by a court in such a country and notice of which has been received by the registering court,

the prescribed officer⁵ of the registering court must cancel the registration⁶.

Where the prescribed officer is of opinion that the payer⁷ is not residing within the jurisdiction of the court and has no assets within that jurisdiction against which the order can be effectively enforced, he must cancel the registration of the order and send a certified copy⁸ of the order to the Lord Chancellor⁹. However, where the prescribed officer of a magistrates' court is of opinion that the payer is residing or has assets within the jurisdiction of another magistrates' court in the same part of the United Kingdom, he must transfer the order to that other court by sending the certified copy of it to the prescribed officer of the other court¹⁰.

Where a certified copy of the order is received by the Lord Chancellor, and it appears to him that the payer is residing or has assets in the United Kingdom, he must transfer that order to the appropriate court¹¹ by sending the certified copy and related documents to the prescribed officer of that court, who must register it in that court in the prescribed manner¹².

Before registering an order an officer must take such steps as he thinks fit to ascertain whether the payer is residing or has assets in the jurisdiction of the court, and if he is then satisfied that the payer is not residing and has no assets in the jurisdiction, he must send the certified copy of the order to the Lord Chancellor¹³.

If an officer of a court is required by any of the provisions described above to send to the Lord Chancellor or another prescribed officer a certified copy of the order, he must send with it a certificate of arrears¹⁴ signed by him, a statement giving such information as he possesses as to the payer's whereabouts and the nature and location of his assets, and any relevant documents in his possession relating to the case¹⁵.

1 For the meaning of 'registered order' see para 316 note 1 ante.

2 For the meaning of 'registering court' see para 316 note 2 ante.

3 For the meaning of 'provisional order' see para 312 note 6 ante.

4 For the meaning of 'reciprocating country' see para 310 note 2 ante.

5 'Prescribed' means prescribed by magistrates' courts rules under the Magistrates' Courts Act 1980 s 144 (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 588) or, as the case may be, rules of court: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1) (definition amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 107). As to the prescribed officer see para 311 note 6 ante.

6 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 10(1). However, any arrears due under the registered order when the registration is cancelled continue to be recoverable: see s 10(1). See also the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 14(1) (amended by SI 1975/2236; SI 2001/615).

7 For the meaning of 'payer' see para 311 note 1 ante.

8 For the meaning of 'certified copy' see para 311 note 9 ante.

9 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 10(2) (s 10(2), (3), (5)-(7) amended by the Civil Jurisdiction and Judgments Act 1982 s 37(1), Sch 11 para 13). As to the transfer of functions to the Lord Chancellor see para 311 note 8 ante. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

10 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 10(3) (as amended: see note 9 supra). On such a transfer, the prescribed officer of the court to which the order is transferred must register it in that court in the prescribed manner: s 10(4); and see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 13(1) (amended by SI 2001/615), and the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 14(2) (added by SI 1975/2236; and amended by SI 2001/615). For the meaning of 'United Kingdom' see para 4 ante.

11 For the meaning of 'appropriate court' see para 314 note 11 ante.

12 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 10(5) (as amended: see note 9 supra); and see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 14(2) (as added and amended: see note 10 supra).

13 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 10(6) (as amended: see note 9 supra).

14 For the meaning of 'certificate of arrears' see para 311 note 12 ante.

15 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 10(7) (as amended: see note 9 supra).

UPDATE

318 Cancellation of registration

NOTE 6--SI 1974/668 r 14(1) further amended: SI 2005/617.

NOTE 10--SI 1974/668 rr 13(1), 14(2) further amended: SI 2005/617.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(a) Enforcement under Part I/319. Payer not resident in the United Kingdom.

319. Payer not resident in the United Kingdom.

If at any time it appears to the Lord Chancellor¹ that the payer² under a maintenance order³, of which a certified copy⁴ has been received by him from a reciprocating country⁵, is not residing and has no assets in the United Kingdom⁶, he must send certain documents to the responsible authority⁷ in that country or (if he thinks it proper having regard to all the circumstances) to the responsible authority in another reciprocating country⁸. Those documents are:

- 336 (1) the certified copy of the order in question and a certified copy of any order varying that order⁹;
- 337 (2) if the order has at any time been a registered order¹⁰, a certificate of arrears¹¹ signed by the prescribed officer¹²;
- 338 (3) a statement giving such information as the Lord Chancellor possesses as to the payer's whereabouts and the nature and location of his assets¹³; and
- 339 (4) any other relevant documents in his possession relating to the case¹⁴.

Where these documents are sent to the responsible authority in a reciprocating country other than that in which the order was made, the Lord Chancellor must inform the responsible authority in the reciprocating country in which the order was made of what he has done¹⁵.

1 As to the transfer of functions to the Lord Chancellor see para 311 note 8 ante. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

2 For the meaning of 'payer' see para 311 note 1 ante.

3 For the meaning of 'maintenance order' see para 310 note 1 ante.

4 For the meaning of 'certified copy' see para 311 note 9 ante.

5 For the meaning of 'reciprocating country' see para 310 note 2 ante.

6 For the meaning of 'United Kingdom' see para 4 ante.

7 For the meaning of 'responsible authority' see para 311 note 17 ante.

8 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 11(1) (amended by the Civil Jurisdiction and Judgments Act 1982 s 37(1), Sch 11 para 14).

9 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 11(1)(a).

10 For the meaning of 'registered order' see para 316 note 1 ante.

11 For the meaning of 'certificate of arrears' see para 311 note 12 ante.

12 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 11(1)(b). 'Prescribed' means prescribed by magistrates' courts rules under the Magistrates' Courts Act 1980 s 144 (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 588) or, as the case may be, rules of court: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1) (definition amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 107). As to the prescribed officer see para 311 note 6 ante.

13 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 11(1)(c).

14 Ibid s 11(1)(d).

15 Ibid s 11(2).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(a) Enforcement under Part I/320. Obtaining evidence.

320. Obtaining evidence.

For the purposes of any proceedings under Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972¹ relating to a maintenance order², a court in the United Kingdom³ may request a court in a reciprocating country⁴ to take or provide evidence relating to such matters as may be specified in the request, and may remit the case to that court for that purpose⁵.

Where a request is made by or on behalf of a court in a reciprocating country, for the purpose of any proceedings before it relating to a maintenance order, for the taking in the United Kingdom of evidence of a person residing there relating to matters specified in the request, such court in the United Kingdom as may be prescribed may take that evidence⁶. Evidence taken in compliance with such a request must be sent in the prescribed manner by the prescribed officer of the court to the court in the reciprocating country concerned⁷.

Where any person, other than the payer⁸ and the payee⁹ under the maintenance order in question, is required to give evidence before a court in the United Kingdom, the court may order the payment of compensation for expense, trouble or loss of time properly incurred in or incidental to his appearance out of money provided by Parliament¹⁰. A person may be compelled by summons and arrest to give evidence¹¹.

1 Ie the Maintenance Orders (Reciprocal Enforcement) Act 1972 Pt 1 (ss 1-24) (as amended).

2 For the meaning of 'maintenance order' see para 310 note 1 ante.

3 For the meaning of 'United Kingdom' see para 4 ante.

4 For the meaning of 'reciprocating country' see para 310 note 2 ante.

5 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 14(5). For the admissibility of such evidence in proceedings in England see para 321 post. For the procedure where the request is made by a magistrates' court see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 11.

6 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 14(1). 'Prescribed' means prescribed by magistrates' courts rules under the Magistrates' Courts Act 1980 s 144 (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 588) or, as the case may be, rules of court: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1) (definition amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 107). As to the prescribed court see the Family Proceedings Rules 1991, SI 1991/1247, r 7.34(1), (3); and the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 10(1), (2). After giving notice of the time and place where the evidence is to be taken to such persons and in such manner as it thinks fit, the court must take the evidence in such manner as may be prescribed: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 14(1); Family Proceedings Rules 1991, SI 1991/1247, r 7.34(2), (4); Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668, r 10(3)-(5).

7 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 14(1). As to the prescribed officer see para 311 note 6 ante.

8 For the meaning of 'payer' see para 311 note 1 ante.

9 For the meaning of 'payee' see para 311 note 5 ante.

10 See the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 14(2) (amended in respect of courts in Northern Ireland by the Northern Ireland (Modification of Enactments No 1) Order 1973, SI 1973/2163).

11 See the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 14(3) (amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 105), applying the Magistrates' Courts Act 1980 s 97(1), (3), (4) (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 734) to the taking of evidence under these provisions).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(a) Enforcement under Part I/321. Admissibility of evidence and proof of orders.

321. Admissibility of evidence and proof of orders.

A statement contained in a duly authenticated¹ document which purports:

- 340 (1) to set out or summarise evidence given in proceedings in a court in a reciprocating country²; or
- 341 (2) to set out or summarise evidence taken in such a country for the purpose of proceedings in a court in the United Kingdom³ under Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972⁴, whether in response to a request made by such a court or otherwise; or
- 342 (3) to have been received in evidence in proceedings in such a country or to be a copy of a document so received,

is admissible in any proceedings in a court in the United Kingdom relating to a maintenance order⁵ as evidence of the facts stated in it to the same extent as oral evidence of that fact is admissible in those proceedings⁶.

Nothing in the provisions described above prejudices the admission in evidence of any document which would otherwise be admissible⁷.

For the purposes of the Act, unless the contrary is shown, any order made by a court in a reciprocating country purporting to bear the seal of that court or be signed by any person in his capacity as a judge, magistrate or officer of that court, must be deemed without further proof to have been duly sealed or signed by that person⁸. The person by whom the order was signed must be deemed without further proof to have been a judge, magistrate or officer, as the case may be, of that court when he signed it and in the case of an officer to have been authorised to sign it⁹. A document purporting to be a certified copy¹⁰ of an order made by a court in a reciprocating country must be deemed without further proof to be such a copy¹¹.

1 A document under head (1) or head (2) in the text is duly authenticated if it purports to be certified by the judge, magistrate or other person before whom the evidence was given or, as the case may be, by whom it was taken, to be: (1) the original document containing or recording or, as the case may be, summarising the evidence; or (2) a true copy of that document: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 13(2). A document under head (3) in the text is duly authenticated if it purports to be certified by a judge, magistrate or officer of the court in question to have been, or to be a true copy of a document which has been, received: s 13(3). It is not necessary in any such proceedings to prove the signature or official position of the person appearing to have given such a certificate: s 13(4).

2 For the meaning of 'reciprocating country' see para 310 note 2 ante.

3 For the meaning of 'United Kingdom' see para 4 ante.

4 Ie the Maintenance Orders (Reciprocal Enforcement) Act 1972 Pt I (ss 1-24) (as amended).

5 Ie a maintenance order to which *ibid* Pt I (as amended) applies. For the meaning of 'maintenance order' see para 310 note 1 ante.

6 *Ibid* s 13(1).

7 *Ibid* s 13(5).

8 Ibid s 15(a).

9 Ibid s 15(b).

10 For the meaning of 'certified copy' see para 311 note 9 ante.

11 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 15(c).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(a) Enforcement under Part I/322. Procedure.

322. Procedure.

All proceedings in magistrates' courts under Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972¹, other than proceedings for the variation or enforcement of a maintenance order, are family proceedings for the purposes of the Magistrates' Courts Act 1980², although the court may order proceedings for the variation of an order, and any proceedings being heard with it, to be treated as family proceedings³. Magistrates' courts rules may be made with regard to certain matters under the Maintenance Orders (Reciprocal Enforcement) Act 1972⁴.

1 Ie the Maintenance Orders (Reciprocal Enforcement) Act 1972 Pt I (ss 1-24) (as amended): see paras 310-321 ante.

2 Magistrates' Courts Act 1980 s 65(1)(f). As to family proceedings in magistrates' courts generally see MAGISTRATES vol 29(2) (Reissue) para 739.

3 See *ibid* s 65(2) (amended by the Children Act 1989 s 92(11), Sch 11 para 8).

4 See the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 18(1) (amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 106). The matters with regard to which such rules may be made are:

- 121 (1) the circumstances in which anything authorised or required to be done by the Maintenance Orders (Reciprocal Enforcement) Act 1972 Pt I (as amended) by, to or before a magistrates' court for a particular sessions area or by, to or before an officer of the court may be done by a court (or officer thereof) for another petty sessions area (s 18(1)(a));
- 122 (2) the orders made, or other things done by a magistrates' court (or officer thereof), or by a court in a reciprocating country, notice of which is to be given to such persons as the rules may provide, and the manner of giving such notice (s 18(1)(b));
- 123 (3) the cases and manner in which courts in reciprocating countries are to be informed of orders made or other things done by a magistrates' court (s 18(1)(c));
- 124 (4) the cases and manner in which a justices' clerk may take evidence needed for the purpose of proceedings in a court in a reciprocating country relating to a maintenance order (s 18(1)(d));
- 125 (5) the circumstances and manner in which cases may be remitted by magistrates' courts to courts in reciprocating countries (s 18(1)(e));
- 126 (6) the circumstances and manner in which magistrates' courts may communicate with courts in reciprocating countries (s 18(1)(f)).

For the meaning of 'reciprocating country' see para 310 note 2 ante. For the meaning of 'maintenance order' see para 310 note 1 ante. As to petty sessions areas see MAGISTRATES vol 29(2) (Reissue) para 591.

For rules made or taking effect under this provision see the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) Rules 1974, SI 1974/668 (amended by SI 1975/2236; SI 1979/170; SI 1983/1148; SI 1986/1962; SI 1992/457; SI 1993/617; SI 2001/615); and the Magistrates' Courts (Reciprocal Enforcement of Maintenance Orders) (Hague Convention Countries) Rules 1980, SI 1980/108 (amended by SI 1986/1962; SI 1992/457; SI 1993/617; SI 1999/2002; SI 2001/615).

UPDATE

322 Procedure

NOTE 4--1972 Act s 18(1) further amended: Courts Act 2003 Sch 8 para 155(2). SI 1974/668 and SI 1980/108 further amended: SI 2005/617.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(b) Enforcement under Part II/323. Application of statutory provisions.

(

323. Application of statutory provisions.

Part II of the Maintenance Orders (Reciprocal Enforcement) Act 1972¹ contains provisions giving effect to the United Nations Convention on the Recovery Abroad of Maintenance², which deals with the reciprocal enforcement of claims for the recovery of maintenance. These provisions have effect in relation to countries outside the United Kingdom³ declared by Order in Council to be Convention countries for the purposes of the provisions⁴. The provisions of the Act may be applied with modifications and adaptations to other countries designated by Order in Council⁵.

1 Ie the Maintenance Orders (Reciprocal Enforcement) Act 1972 Pt II (ss 25-39) (as amended): see the text and notes infra; and para 324 et seq post.

2 Ie the United Nations Convention on the Recovery Abroad of Maintenance (New York, 20 June 1956; TS 85 (1975); Cmnd 6084): Maintenance Orders (Reciprocal Enforcement) Act 1972 s 25(2).

3 For the meaning of 'United Kingdom' see para 4 ante.

4 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 25(1). Such countries are referred to in the Act as 'Convention countries': s 25(1). Such an Order in Council may be varied or revoked by a subsequent Order in Council, which may contain such incidental, consequential and transitional provisions as seem expedient: s 45(1). An Order in Council is subject to annulment in pursuance of a resolution of either House of Parliament: s 45(2).

The following are declared to be Convention countries by Order in Council: Algeria, Australia, Austria, Barbados, Belgium, Bosnia and Herzegovina, Brazil, Burkina Faso, Cape Verde, Central African Republic, Chile, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Finland, France (including overseas territories), Germany, Greece, Guatemala, Haiti, Holy See, Hungary, Israel, Ireland, Italy, Luxembourg, Mexico, Monaco, Morocco, Netherlands, New Zealand, Niger, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sri Lanka, Suriname, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Tunisia, Turkey, Uruguay and Yugoslavia: Recovery Abroad of Maintenance (Convention Countries) Order 1975, SI 1975/423 (amended by SI 1978/279; SI 1982/1530; SI 1996/1925; SI 2002/2839).

5 See the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 40; and the Recovery of Maintenance (United States of America) Order 1993, SI 1993/591.

UPDATE

323 Application of statutory provisions

NOTE 5--SI 1993/591 superseded by the Recovery of Maintenance (United States of America) Order 2007, SI 2007/2006.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(b) Enforcement under Part II/324. Recovery of maintenance in Convention country.

324. Recovery of maintenance in Convention country.

Where a person ('the applicant') in the United Kingdom¹:

- 343 (1) claims to be entitled to recover maintenance in a Convention country² from a person subject to the jurisdiction of that country; or
- 344 (2) seeks to vary any provision made in a Convention country for the payment by any other person who is subject to the jurisdiction of that country,

he may apply³ to the Lord Chancellor to have his claim for recovery of maintenance or his application for variation transmitted to that country⁴.

On receiving an application, the Lord Chancellor must transmit it, together with any accompanying documents, to the appropriate authority in the Convention country, unless he is satisfied that it is not made in good faith or that it does not comply with the requirements of the law applied by that country⁵. He may request the appropriate officer to obtain from the court of which he is an officer such information relating to the application as may be specified, and the court must furnish the Lord Chancellor with the information he requires⁶.

1 For the meaning of 'United Kingdom' see para 4 ante.

2 As to the meaning of 'Convention country' see para 323 note 4 ante.

3 An application must be made through the appropriate officer, who must assist the applicant in completing an application complying with the requirements of the law applied by the Convention country, and must send the application to the Lord Chancellor together with such other documents as may be required by that law: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 26(3). The 'appropriate officer' is, where the applicant is residing in England, the justices' chief executive for the petty sessions area: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 26(6)(a) (substituted by the Access to Justice Act 1999 Sch 13 para 76). As to petty sessions areas see MAGISTRATES vol 29(2) (Reissue) para 591. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. As to the transfer of functions to the Lord Chancellor see para 311 note 8 ante. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq. For specific provision relating to the United States see the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 26(3A) (added by the Recovery of Maintenance (United States of America) Order 1993, SI 1993/591); and the Magistrates' Courts (Recovery Abroad of Maintenance) Rules 1975, SI 1975/488, r 5A (added by SI 1979/1561; and amended by SI 2001/615).

4 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 26(1), (2).

5 Ibid s 26(4).

6 Ibid s 26(5).

UPDATE

324 Recovery of maintenance in Convention country

NOTE 3--Maintenance Orders (Reciprocal Enforcement) Act 1972 s 26(6)(a) further amended: Courts Act 2003 Sch 8 para 158. SI 1993/591 superseded by the Recovery of

Maintenance (United States of America) Order 2007, SI 2007/2006. SI 1975/488 r 5A further amended: SI 2005/617, SI 2007/2267.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(b) Enforcement under Part II/325. Recovery of maintenance in England by persons in Convention countries.

325. Recovery of maintenance in England by persons in Convention countries.

Any application which is received by the Lord Chancellor from the appropriate authority in a Convention country¹, and which is an application by a person in that country for the recovery of maintenance from another person who is for the time being residing in England², must be treated for the purposes of any enactment as if it were an application for a maintenance order³ under a relevant Act⁴, made at the time when the application was received by the Lord Chancellor⁵.

On receipt of such an application the Lord Chancellor must send it, together with any accompanying documents, to the justices' chief executive for a magistrates' court for the petty sessions area where the respondent is residing⁶. If notice of the hearing of the application by a magistrates' court having jurisdiction to hear it cannot be duly served on the respondent, the justices' chief executive for the court must return the application and accompanying documents to the Lord Chancellor with a statement giving such information as he possesses as to the whereabouts of the respondent⁷. If the justices' chief executive for a court to whom the application is sent is satisfied that the respondent is residing within the petty sessions area for which another magistrates' court acts, he must send the application and accompanying documents to the justices' chief executive for the other court and inform the Lord Chancellor that he has done so⁸.

Where a magistrates' court makes an order on such an application⁹, the court must at the same time exercise one of the following powers¹⁰:

- 345 (1) the power to order that payments under the order be made directly to the justices' chief executive for the court or of any other magistrates' court in England¹¹;
- 346 (2) the power to order that payments under the order be made to the justices' chief executive for that or any other magistrates' court in England by such method¹² as may be specified¹³; and
- 347 (3) the power to make an attachment of earnings order¹⁴.

In deciding which of these powers to exercise the court must have regard to any representations made by the person liable to make payments under the order¹⁵.

Where the court proposes to exercise its power under head (2) above and, having given the debtor¹⁶ an opportunity of opening an account from which payments may be made in accordance with the method of payment proposed to be ordered, the court is satisfied that he has failed without reasonable excuse to do so, it may order that he open such an account¹⁷.

The justices' chief executive for the court must register the order in the court in the prescribed manner¹⁸.

1 As to the meaning of 'Convention country' see para 323 note 4 ante.

2 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 For the meaning of 'maintenance order' see para 310 note 1 ante; definition applied by the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 39 (definition added by the Maintenance Orders (Reciprocal Enforcement) Act 1992 s 1(2), Sch 1 para 19).

4 In the case of an application for maintenance for a child (or children) alone, the relevant Act is the Children Act 1989; in any other case, the relevant Act is the Domestic Proceedings and Magistrates' Courts Act 1978: Maintenance Orders (Reciprocal Enforcement) Act 1972 ss 27A(3), (4) (ss 27A-27C added by the Maintenance Orders (Reciprocal Enforcement) Act 1992 Sch 1 para 13). 'Child' has the same meaning as in the Children Act 1989 s 105(1), Sch 1 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 3): Maintenance Orders (Reciprocal Enforcement) Act 1972 s 27A(5) (as so added).

5 Ibid s 27A(1), (2) (as added: see note 4 supra). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

6 Ibid s 27B(1) (as added (see note 4 supra); and s 27B(1), (2), (4), (5) amended by the Access to Justice Act 1999 s 90(1), Sch 13 para 77). As to petty sessions areas see MAGISTRATES vol 29(2) (Reissue) para 591. As to the procedure to be followed by the clerk see the Magistrates' Courts (Recovery Abroad of Maintenance) Rules 1975, SI 1975/488, r 3A (added by SI 1993/617; and amended by SI 2001/615).

7 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 27B(2) (as added and amended: see notes 4, 6 supra). If the application is so returned, the Lord Chancellor must, unless he is satisfied that the respondent is not residing in the United Kingdom, take specified steps: see s 27B(3) (as added: see note 4 supra). For the meaning of 'United Kingdom' see para 4 ante.

8 Ibid s 27B(4) (as added and amended: see notes 4, 6 supra). If an application is sent to a justices' chief executive for a court under this provision, he must proceed as if it had been sent to him under s 27B(1) (as added and amended) (see the text and note 6 supra): s 27B(5) (as so added and amended).

9 Where the magistrates' court dismisses the application, the justices' chief executive must send written notice to the Lord Chancellor, including a statement of reasons: Magistrates' Courts (Recovery Abroad of Maintenance) Rules 1975, SI 1975/488, r 4 (amended by SI 1993/617; SI 2001/615).

10 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 27C(1), (3) (as added: see note 4 supra). Accordingly, the Magistrates' Courts Act 1980 s 59 (as substituted) (see para 298 note 10 ante) does not apply: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 27C(2) (as so added).

11 Ibid s 27C(4)(a) (as added (see note 4 supra); and s 27C(4)(a) amended by the Access to Justice Act 1999 Sch 13 para 78).

12 Ie a method falling within the Magistrates' Courts Act 1980 s 59(6) (as substituted) (see MAGISTRATES vol 29(2) (Reissue) para 820).

13 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 27C(4)(b) (as added (see note 4 supra); and s 27C(4)(b) amended by the Access to Justice Act 1999 Sch 13 para 78).

14 Ie an order under the Attachment of Earnings Act 1971 (see MAGISTRATES vol 29(2) (Reissue) para 839 et seq): Maintenance Orders (Reciprocal Enforcement) Act 1972 s 27C(4)(c) (as added: see note 4 supra).

15 Ibid s 27C(5) (as added: see note 4 supra).

16 For the meaning of 'debtor' see para 298 note 10 ante.

17 Magistrates' Courts Act 1980 s 59(4) (substituted by the Maintenance Enforcement Act 1991 s 2); applied and modified by the Maintenance Orders (Facilities for Enforcement) Act 1972 s 27C(6) (as added: see note 4 supra).

18 Ibid s 27C(7) (as added (see note 4 supra); and s 27C(7) amended by the Access to Justice Act 1999 Sch 13 para 78(3)). 'Prescribed' means prescribed by magistrates' courts rules under the Magistrates' Courts Act 1980 s 144 (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 588) or, as the case may be, rules of court: Maintenance Orders (Reciprocal Enforcement) Act 1972 ss 21(1), 39 (s 21(1) amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 107). See the Magistrates' Courts (Recovery Abroad of Maintenance) Rules 1975, SI 1975/488, rr 5(1), 6(1) (both amended by SI 1993/617; and the Magistrates' Courts (Recovery Abroad of Maintenance) Rules 1975, SI 1975/488, r 6(1) further amended by SI 2001/615).

UPDATE

325 Recovery of maintenance in England by persons in Convention countries

NOTE 6--Maintenance Orders (Reciprocal Enforcement) Act 1972 s 27B(1), (2) amended, s 27B(4) substituted: Courts Act 2003 Sch 8 para 159.

NOTE 9--SI 1975/488 r 4 further amended: SI 2005/617.

NOTES 11-13--1972 Act s 27C(4) further amended: 2003 Act Sch 8 para 160(2).

NOTE 18--1972 Act ss 21(1), 27C(7) further amended: 2003 Act Sch 8 paras 156, 160(3).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(b) Enforcement under Part II/326. Application by former spouse.

326. Application by former spouse.

Where an application for recovery of maintenance falls to be treated as if it were an application under the Domestic Proceedings and Magistrates' Courts Act 1978¹ and:

- 348 (1) the applicant and respondent were formerly married²;
- 349 (2) the marriage was dissolved or annulled in a country or territory outside the United Kingdom³ by a divorce or annulment recognised as valid by the law of England⁴;
- 350 (3) an order for the payment of maintenance for the benefit of the applicant or a child of the family⁵ has, by reason of the divorce or annulment, been made by a court in a Convention country⁶; and
- 351 (4) where the order for the payment of maintenance was made by a court of a different country from that in which the divorce or annulment was obtained, either the applicant or the respondent was resident in the Convention country whose court made that order at the time the order was applied for⁷,

any magistrates' court which would have jurisdiction under the Domestic Proceedings and Magistrates' Courts Act 1978⁸ to hear the application if the parties were still married, has such jurisdiction notwithstanding the dissolution or annulment⁹.

If the magistrates' court is satisfied that the respondent has failed to comply with the provisions of an order mentioned in head (3) above, it may make an order for financial provision or an interim order¹⁰. The court may not make an order for periodical payments for the benefit of the applicant or any child of the family unless the order made in the Convention country makes such provision¹¹. Nor may the court make an order for the payment of a lump sum for the benefit of the applicant or any child of the family unless the order made in the Convention country makes provision for the payment of a lump sum to the applicant or that child¹².

1 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 28A(1) (s 28A added by the Domestic Proceedings and Magistrates' Courts Act 1978 s 58; and substituted by the Maintenance Orders (Reciprocal Enforcement) Act 1992 s 1(2), Sch 1 para 13). As to applications to be treated as described in the text see para 325 text and note 4 ante. No provision of an order under the Children Act 1989 s 92, Sch 11 (as amended) requiring the transfer of proceedings from a magistrates' court to a county court or the High Court applies where an application is to be treated as an application for a maintenance order under that Act (see para 325 text and note 4 ante): Maintenance Orders (Reciprocal Enforcement) Act 1972 s 28B (added by the Maintenance Orders (Reciprocal Enforcement) Act 1992 Sch 1 para 13). For the meaning of 'maintenance order' see para 310 note 1 ante.

Where the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 28A (as added and substituted) does not apply, the magistrates' court hearing an application which is to be treated as described in the text may make any order which it has power to make under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or s 19(1) (as amended), and Pt I (ss 1-35) (as amended) of that Act is modified in such a case: see the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 28 (substituted by the Maintenance Orders (Reciprocal Enforcement) Act 1992 Sch 1 para 13). But see para 330 note 14 post.

2 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 28A(1)(a) (as added and substituted: see note 1 supra).

3 For the meaning of 'United Kingdom' see para 4 ante.

4 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 28A(1)(b) (as added and substituted: see note 1 supra). As to the meanings of 'England', 'English' and 'English law' see para 4 ante. A divorce or annulment obtained in a country outside the United Kingdom is presumed to be recognised as valid under the law of England unless the contrary is proved: s 28A(7) (as so added and substituted).

5 'Child of the family' has the same meaning as in the Domestic Proceedings and Magistrates' Courts Act 1978 s 88(1) (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 307); Maintenance Orders (Reciprocal Enforcement) Act 1972 s 28A(8) (as added and substituted: see note 1 supra).

6 Ibid s 28A(1)(c) (as added and substituted: see note 1 supra). As to the meaning of 'Convention country' see para 323 note 4 ante.

7 Ibid s 28A(1)(d) (as added and substituted: see note 1 supra).

8 Ie under the Domestic Proceedings and Magistrates' Courts Act 1978 s 30 (as modified by the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 28A(6) (as added and substituted: see note 1 supra)). But see para 330 note 14 post.

9 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 28A(2) (as added and substituted: see note 1 supra).

10 Ie any order which it would have power to make under the Domestic Proceedings and Magistrates' Courts Act 1978 s 2 or s 19(1) (as amended); Maintenance Orders (Reciprocal Enforcement) Act 1972 s 28A(3) (as added and substituted: see note 1 supra).

11 Ibid s 28A(4) (as added and substituted: see note 1 supra).

12 Ibid s 28A(5) (as added and substituted: see note 1 supra).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(b) Enforcement under Part II/327. Transfer of orders.

327. Transfer of orders.

Where the prescribed officer¹ of a registering court² is of opinion that the payer³ under a registered order⁴ has ceased to reside within the jurisdiction of the court, he must send a certified copy⁵ of the order and the related documents⁶ to the Lord Chancellor⁷; if the officer is of opinion that the payer has ceased to reside in the United Kingdom⁸ he must send a notice to that effect to the Lord Chancellor⁹. Where the appropriate officer of a registering magistrates' court is of opinion that the payer is residing within the jurisdiction of another magistrates' court in the same part of the United Kingdom, he must transfer the order to that other court by sending a certified copy of it and the related documents to the appropriate officer of that other court, who must register the order in that court in the prescribed manner¹⁰. Where a certified copy of an order is received by the Lord Chancellor, and it appears to him that the payer is still residing in the United Kingdom, he must transfer the order to the appropriate court¹¹ by sending the copy and related documents to the prescribed officer of the appropriate court, who must register it in that court in the prescribed manner¹². Where a certified copy of an order is received by the Lord Chancellor, and it appears to him that the payer is not residing in the United Kingdom, he must return the copy and the related documents to the registering court¹³.

On registering an order, an officer must give notice of the registration in the prescribed manner to the prescribed officer of the court in which the order was previously registered¹⁴, and the officer to whom such notice is given must cancel the previous registration¹⁵.

Before registering an order as described above an officer of a court must take such steps as he thinks fit to ascertain whether the payer is residing within the jurisdiction of the court, and if after taking those steps he is satisfied that the payer is not so residing he must return the certified copy of the order and the related documents to the officer of the court (or, as the case may be, to the Lord Chancellor), from whom he received them, together with a statement giving such information as he possesses as to the whereabouts of the payer¹⁶.

1 'Prescribed' means prescribed by magistrates' courts rules under the Magistrates' Courts Act 1980 s 144 (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 588) or, as the case may be, rules of court: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1) (definition amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 107). In relation to a magistrates' court, the prescribed officer is the clerk to the justices: Magistrates' Courts (Recovery Abroad of Maintenance) Rules 1975, SI 1975/488, r 3.

2 'Registering court', in relation to a registered order (see note 4 *infra*), means the court in which that order is for the time being registered under the Maintenance Orders (Reciprocal Enforcement) Act 1972 Pt II (ss 25-39) (as amended): s 39.

3 'Payer', in relation to a registered order (see note 4 *infra*), means the person liable to make payments under the order: *ibid* s 32(8).

4 'Registered order' means an order which is for the time being registered in a court in the United Kingdom under *ibid* Pt II (as amended): s 39.

5 For the meaning of 'certified copy' see para 311 note 9 *ante*; definition applied by *ibid* s 32(8).

6 'Related documents' means: (1) the application on which the order was made; (2) a certificate of arrears signed by the prescribed officer of the registering court; (3) a statement giving such information as he possesses as to the whereabouts of the payer; and (4) any relevant documents in his possession relating to the case: *ibid* s 32(8). For the meaning of 'certificate of arrears' see para 311 note 12 *ante*; definition applied by s 32(8).

7 As to the transfer of functions to the Lord Chancellor see para 311 note 8 ante. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

8 For the meaning of 'United Kingdom' see para 4 ante.

9 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 32(1).

10 Ibid s 32(2) (amended by the Access to Justice Act 1999 s 90(1), Sch 13 para 79). See also the Magistrates' Courts (Recovery Abroad of Maintenance) Rules 1975, SI 1975/488, r 5(2), (3); and the text and note 16 infra. 'Appropriate officer' means, in relation to a court in England, the justices' chief executive for the court: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 32(2A)(a) (s 32(2A) added by the Access to Justice Act 1999 Sch 13 para 79). References to a part of the United Kingdom are to England and Wales, Scotland, or Northern Ireland: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 47(2). Cf para 4 ante.

11 'The appropriate court' means a magistrates' court within the jurisdiction of which that person is residing: ibid s 32(8).

12 Ibid s 32(3). See also the text and note 16 infra.

13 Ibid s 32(5).

14 Ibid s 32(6).

15 Ibid s 32(7).

16 Ibid s 32(4).

UPDATE

327 Transfer of orders

NOTE 10--Maintenance Orders (Reciprocal Enforcement) Act 1972 s 32(2A) amended: Courts Act 2003 Sch 8 para 161. SI 1975/488 r 5(2) amended: SI 2005/617.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(b) Enforcement under Part II/328. Enforcement of registered orders.

328. Enforcement of registered orders.

A registered order¹ which is registered in a court other than that in which it was made may be enforced as if the registering court² had made it and had had jurisdiction to do so, and proceedings relating to enforcement may be taken accordingly (but not otherwise)³. The order is enforceable as if it were a magistrates' court maintenance order⁴, and the court and its officers must take all steps for enforcing it as may be prescribed⁵. In any proceedings for enforcement of an order which is for the time being registered in any court, a certificate of arrears⁶ sent to the prescribed officer⁷ is evidence of the facts stated in it⁸.

1 For the meaning of 'registered order' see para 327 note 4 ante.

2 For the meaning of 'registering court' see para 327 note 2 ante.

3 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 33(1). This does not apply to an order registered in the High Court under the Maintenance Orders Act 1958 Pt I (ss 1-5) (as amended) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 664 et seq); Maintenance Orders (Reciprocal Enforcement) Act 1972 s 33(2).

4 See *ibid* s 33(3), (3A) (s 33(3) substituted by the Family Law Reform Act 1987 s 33(1), Sch 2 para 50; Maintenance Orders (Reciprocal Enforcement) Act 1972 s 33(3) subsequently amended, and s 33(3A) added, by the Maintenance Enforcement Act 1991 s 10, Sch 1 para 18). 'Magistrates' court maintenance order' has the same meaning as in the Magistrates' Courts Act 1980 s 150(1) (definition as added) (see MAGISTRATES vol 29(2) (Reissue) para 820); Maintenance Orders (Reciprocal Enforcement) Act 1972 s 33(3) (as so substituted and amended).

The Magistrates' Courts Act 1980 ss 76, 93 (both as amended) (enforcement of judgment and complaint for arrears) (see MAGISTRATES vol 29(2) (Reissue) paras 829, 831) are subject, in this regard, to the modifications made by the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 8(4A), (4B) (as added) (see para 316 note 4 ante); s 33(3A) (as so added).

The Maintenance Orders Act 1950 Pt II (ss 16-25) (as amended) (see para 293 et seq ante) does not apply to a registered order: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 33(6).

5 *Ibid* s 33(4). 'Prescribed' means prescribed by magistrates' courts rules under the Magistrates' Courts Act 1980 s 144 (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 588) or, as the case may be, rules of court: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1) (definition amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 107).

6 *Ie* a certificate of arrears sent under the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 32 (as amended): see para 327 ante. For the meaning of 'certificate of arrears' see paras 311 note 12, 327 note 6 ante.

7 As to the prescribed officer see para 327 note 1 ante.

8 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 33(5).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(b) Enforcement under Part II/329. Variation and revocation of registered orders: general.

329. Variation and revocation of registered orders: general.

Where a registered order¹ is registered in a court other than that in which it was made, the registering court² has the like power to vary or revoke³ it as if that court had made it and had had jurisdiction to make it⁴. No court other than the registering court has power to vary or revoke a registered order⁵. Where a registering court revokes a registered order it must cancel the registration⁶.

Where the Lord Chancellor⁷ receives from the appropriate authority in a Convention country⁸ an application by a person in that country for the variation of a registered order, he must, if the registering court is a magistrates' court, send the application, together with any accompanying documents, to the justices' chief executive for the court, if the court is in England⁹. Where a court in a part of the United Kingdom¹⁰ makes or refuses to make an order varying or revoking a registered order made by a court in another part of the United Kingdom, any person has the same right of appeal as if the registered order had been made by the first-mentioned court¹¹.

1 For the meaning of 'registered order' see para 327 note 4 ante.

2 For the meaning of 'registering court' see para 327 note 2 ante.

3 'Revoke' and 'revocation' include discharge: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 39 (definition added by the Maintenance Orders (Reciprocal Enforcement) Act 1992 s 1(2), Sch 1 para 19).

4 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 34(1) (amended by the Maintenance Enforcement Act 1991 s 10, Sch 1 para 19; and the Maintenance Orders (Reciprocal Enforcement) Act 1992 Sch 1 para 15(1), (2)). This is expressed to be subject to the provisions described in para 330 post. The Magistrates' Courts Act 1980 s 60(1) (as substituted) (see MAGISTRATES vol 29(2) (Reissue) para 823) is modified in its application to a registered order: see the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 34(3A) (added by the Maintenance Orders (Reciprocal Enforcement) Act 1992 Sch 1 para 15(3)).

5 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 34(1) (as amended: see note 4 supra).

6 Ibid s 34(2).

7 As to the transfer of functions to the Lord Chancellor see para 311 note 8 ante. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

8 As to the meaning of 'Convention country' see para 323 note 4 ante.

9 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 34(3) (amended by the Access to Justice Act 1999 s 90(1), Sch 13 para 80). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

10 As to references to a part of the United Kingdom see para 327 note 10 ante. Cf para 4 ante.

11 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 34(4).

UPDATE

329 Variation and revocation of registered orders: general

NOTE 9--Maintenance Orders (Reciprocal Enforcement) Act 1972 s 34(3) further amended: amended: Courts Act 2003 Sch 8 para 163.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(b) Enforcement under Part II/330. Variation of registered orders by magistrates' courts.

330. Variation of registered orders by magistrates' courts.

Where a registered order¹ is registered in a magistrates' court in England², and the court is satisfied that payment has not been made in accordance with the order, the power of the court to vary the order includes power to do one of the following³:

- 352 (1) order that payments be made directly to a justices' chief executive⁴;
- 353 (2) order that payments be so made by a prescribed method⁵; or
- 354 (3) make an attachment of earnings order⁶.

In deciding which of these powers to exercise, the court must have regard to any representations made by the debtor⁷.

Where a registered order is registered in a magistrates' court in England and payments under it are required to be made as mentioned in head (2) above, an interested party⁸ may apply in writing to the clerk of the court in which the order is registered for the order to be varied⁹. Where such an application has been made, the clerk, after giving written notice to any other interested party and allowing that party, within 14 days beginning with the date of the notice, an opportunity to make written representations, may vary the order to provide that payment is to be made as described in head (1) above¹⁰. The clerk may proceed with the application, however, notwithstanding that an interested party has not received written notice of it¹¹. If the clerk considers it inappropriate to exercise his power to vary the order, he may refer the matter to the court which may vary the order by exercising one of its powers under heads (1) to (3) above¹².

Where the court proposes to exercise its power under head (2) above and, having given the debtor an opportunity of opening an account from which payments may be made in accordance with the method of payment proposed to be ordered, the court is satisfied that he has failed without reasonable excuse to do so, it may order that he open such an account¹³.

A magistrates' court in England has jurisdiction to hear an application for the variation or revocation of a registered order registered in that court, made by the person against whom or on whose application the order was made, notwithstanding that the person by or against whom the application is made is residing outside England¹⁴. Where the respondent to an application for variation or revocation of an order registered in a magistrates' court in England does not appear at the time and place appointed for the hearing of the application, but the court is satisfied that he is residing outside England and that the prescribed¹⁵ notice of the application and the time and place of the hearing has been given to him in the prescribed manner¹⁶, the court may proceed to hear and determine the application at the time and place appointed for the hearing or any adjourned hearing as if the respondent had so appeared¹⁷.

1 For the meaning of 'registered order' see para 327 note 4 ante.

2 ie whether or not it is the court which made the order: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 34A(1) (s 34A added by the Maintenance Enforcement Act 1991 s 10, Sch 1 para 19(2)). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 34A(1), (2) (as added: see note 2 supra). These provisions apply, in the circumstances set out in the text, in place of: (1) the Magistrates' Courts Act 1980 s 60(3)-(11) (as substituted) (see MAGISTRATES vol 29(2) (Reissue) para 823); (2) the Domestic Proceedings and Magistrates' Courts Act 1978 s 20ZA (as added) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 580); and (3) the Children Act 1989 s 15(1) (as amended), Sch 1 para 6A (as added) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 542): Maintenance Orders (Reciprocal Enforcement) Act 1972 s 34A(1)(a)-(c) (as added: see note 2 supra). None of these powers apply in relation to an application under s 35 (as substituted): see text and notes 14-17 infra.

4 Ibid s 34A(3)(a) (as added (see note 2 supra); and amended by the Access to Justice Act 1999 s 90(1), Sch 13 para 81(2)).

5 Ie under the Magistrates' Courts Act s 59(6) (as substituted) (see MAGISTRATES vol 29(2) (Reissue) para 820): Maintenance Orders (Reciprocal Enforcement) Act 1972 s 34A(3)(b) (as added: see note 2 supra).

6 Ie an order under the Attachment of Earnings Act 1971 (see MAGISTRATES vol 29(2) (Reissue) para 839 et seq): Maintenance Orders (Reciprocal Enforcement) Act 1972 s 34A(3)(c) (as added: see note 2 supra).

7 Ibid s 34A(9) (as added: see note 2 supra). 'Debtor' has the same meaning as in the Magistrates' Courts Act 1980 s 59 (as substituted) (see para 298 note 10 ante): Maintenance Orders (Reciprocal Enforcement) Act 1972 s 34A(11) (as so added).

8 'Interested party' means the debtor or the creditor: ibid s 34A(7) (as added: see note 2 supra). 'Creditor' has the same meaning as in the Magistrates' Courts Act 1980 s 59 (as substituted) (see para 298 note 10 ante): Maintenance Orders (Reciprocal Enforcement) Act 1972 s 34A(11) (as so added).

9 Ibid s 34A(4) (as added (see note 2 supra); and amended by the Access to Justice Act 1999 Sch 13 para 81(3)).

10 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 34A(5) (as added: see note 2 supra).

11 Ibid s 34A(6) (as added: see note 2 supra).

12 Ibid s 34A(8) (as added: see note 2 supra). In deciding which of these powers to exercise, the court must have regard to any representations made by the debtor: s 34A(9) (as so added).

13 Magistrates' Courts Act 1980 s 59(4) (substituted by the Maintenance Enforcement Act 1991 s 2); applied and modified by the Maintenance Orders (Facilities for Enforcement) Act 1972 s 34A(10) (as added: see note 2 supra).

14 Ibid s 35(1) (s 35 substituted by the Maintenance Orders (Reciprocal Enforcement) Act 1992 s 1(2), Sch 1 para 16). This is notwithstanding anything in the Maintenance Orders (Facilities for Enforcement) Act 1972 s 28(2) (as substituted) or s 28A(6)(e) (as added) (see para 326 ante). None of the powers of the court or the clerk are available in relation to such an application: see s 35(2) (as so substituted).

15 'Prescribed' means prescribed by magistrates' courts rules under the Magistrates' Courts Act 1980 s 144 (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 588) or, as the case may be, rules of court: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1) (definition amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 107).

16 See the Magistrates' Courts (Recovery Abroad of Maintenance) Rules 1975, SI 1975/488, r 8 (amended by SI 1993/617; SI 2001/615).

17 Maintenance Orders (Facilities for Enforcement) Act 1972 s 35(3) (as substituted: see note 14 supra).

UPDATE

330 Variation of registered orders by magistrates' courts

NOTES 4-9--Maintenance Orders (Reciprocal Enforcement) Act 1972 s 34A(3)-(5) amended: Courts Act 2003 Sch 8 para 163.

NOTE 16--SI 1975/488 r 8 further amended: SI 2005/617.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(b) Enforcement under Part II/331. Obtaining evidence.

331. Obtaining evidence.

A court in the United Kingdom¹, for the purpose of any proceedings in that court under Part II of the Maintenance Orders (Reciprocal Enforcement) Act 1972² arising out of an application received by the Lord Chancellor³ from a Convention country⁴, may request the Lord Chancellor to make to the appropriate authority or court in that country a request for the taking in that country of the evidence of a person residing there relating to matters connected with the application⁵. The request made by the court must give details of the application, state the name and address of the person whose evidence is to be taken, and specify the matters relating to which that person's evidence is required⁶. If the Lord Chancellor is satisfied that a request made to him contains sufficient information to enable the evidence of the person named in it, relating to the specified matters, to be taken by a court or person in the Convention country, he must transmit the request to the appropriate authority or court in that country⁷.

1 For the meaning of 'United Kingdom' see para 4 ante.

2 I.e the Maintenance Orders (Reciprocal Enforcement) Act 1972 Pt II (ss 25-39) (as amended): see paras 323-330 ante.

3 As to the transfer of functions to the Lord Chancellor see para 311 note 8 ante. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

4 As to the meaning of 'Convention country' see para 323 note 4 ante.

5 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 37(1).

6 Ibid s 37(2).

7 Ibid s 37(3).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(b) Enforcement under Part II/332. Admissibility of evidence.

332. Admissibility of evidence.

A statement contained in a duly authenticated¹ document which purports:

- 355 (1) to set out or summarise evidence given in proceedings in a court in a Convention country²; or
- 356 (2) to set out or summarise evidence taken in such a country for the purpose of proceedings in a court in the United Kingdom³ under Part II of the Maintenance Orders (Reciprocal Enforcement) Act 1972⁴, whether in response to a request made by such a court or otherwise; or
- 357 (3) to have been received in evidence in proceedings in such a country or to be a copy of a document so received,

is admissible in specified proceedings⁵ in a magistrates' court as evidence of the facts stated in it to the same extent as oral evidence of that fact is admissible in those proceedings⁶.

Nothing in the provisions described above prejudices the admission in evidence of any document which would otherwise be admissible⁷.

1 A document under head (1) or head (2) in the text is duly authenticated if it purports to be certified by the judge, magistrate or other person before whom the evidence was given or, as the case may be, by whom it was taken, to be: (1) the original document containing or recording or, as the case may be, summarising the evidence; or (2) a true copy of that document: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 36(2). A document under head (3) in the text is duly authenticated if it purports to be certified by a judge, magistrate or officer of the court in question to have been, or to be a true copy of a document which has been, received: s 36(3). It is not necessary in any such proceedings to prove the signature or official position of the person appearing to have given such a certificate: s 36(4).

2 As to the meaning of 'Convention country' see para 323 note 4 ante.

3 For the meaning of 'United Kingdom' see para 4 ante.

4 Ie the Maintenance Orders (Reciprocal Enforcement) Act 1972 Pt II (ss 25-39) (as amended).

5 Ie proceedings arising out of an application to which *ibid* s 27A(1) (as added) applies (see para 325 ante).

6 *Ibid* s 36(1) (amended by the Domestic Proceedings and Magistrates' Courts Act 1978 s 60(3); and the Maintenance Orders (Reciprocal Enforcement) Act 1992 s 1(2), Sch 1 para 17).

7 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 36(5).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(b) Enforcement under Part II/333. Taking evidence for a court in a Convention country.

333. Taking evidence for a court in a Convention country.

Where a request is made to the Lord Chancellor¹ by or on behalf of a court in a Convention country² to obtain the evidence of a person residing in the United Kingdom³ relating to matters connected with an application⁴, the Lord Chancellor must request such court, or such officer of a court, as he may determine to take the evidence of that person relating to such matters connected with the application as may be specified⁵. The court or officer receiving such a request from the Lord Chancellor has power to take the evidence and, after giving notice of the time and place at which it is to be taken to such persons and in such manner as it or he thinks fit, must take the evidence in such manner as may be prescribed⁶. The evidence so taken must be sent in the prescribed manner⁷ by the prescribed officer⁸ to the court in the Convention country concerned⁹.

Where any person (other than the original applicant) is required to give evidence before a court in the United Kingdom, the court may order such payments, out of money provided by Parliament, as appear reasonably sufficient to compensate him for the expense, trouble or loss of time properly incurred in or incidental to his attendance¹⁰. A person may be compelled by summons and arrest to give evidence¹¹.

1 As to the transfer of functions to the Lord Chancellor see para 311 note 8 ante. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

2 As to the meaning of 'Convention country' see para 323 note 4 ante.

3 For the meaning of 'United Kingdom' see para 4 ante.

4 I.e. an application under the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 26 (as amended): see para 324 ante.

5 Ibid s 38(1).

6 See ibid s 38(2). 'Prescribed' means prescribed by magistrates' courts rules under the Magistrates' Courts Act 1980 s 144 (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 588) or, as the case may be, rules of court: Maintenance Orders (Reciprocal Enforcement) Act 1972 s 21(1) (definition amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 107). See the Magistrates' Courts (Recovery Abroad of Maintenance) Rules 1975, SI 1975/488, rr 9, 10 (r 10 amended by SI 2001/615).

7 See the Magistrates' Courts (Recovery Abroad of Maintenance) Rules 1975, SI 1975/488, r 11.

8 As to the prescribed officer see ibid rr 9-11 (as amended); and para 311 note 6 ante.

9 Maintenance Orders (Reciprocal Enforcement) Act 1972 s 38(2).

10 Ibid s 38(3) (amended in respect of a court in Northern Ireland by the Northern Ireland (Modification of Enactments No 1) Order 1973, SI 1973/2163).

11 See the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 38(4) (amended by the Magistrates' Courts Act 1980 s 154, Sch 7 para 109), applying the Magistrates' Courts Act 1980 s 97(1), (3), (4) (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 734) to the taking of evidence under these provisions.

UPDATE

333 Taking evidence for a court in a Convention country

NOTE 6--SI 1975/488 r 10 further amended: SI 2005/617.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/D. RECIPROCAL ENFORCEMENT UNDER THE MAINTENANCE ORDERS (RECIPROCAL ENFORCEMENT) ACT 1972/(b) Enforcement under Part II/334. Magistrates' courts rules.

334. Magistrates' courts rules.

Rules made under the Magistrates' Courts Act 1980¹ may make provision with respect to orders made or other things done by a magistrates' court or an officer of such a court by virtue of Part II of the Maintenance Orders (Reciprocal Enforcement) Act 1972².

¹ See under the Magistrates' Courts Act 1980 s 144 (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 588).

² See the Maintenance Orders (Reciprocal Enforcement) Act 1972 Pt II (ss 25-39) (as amended); see s 38A(1) (s 38A added by the Maintenance Orders (Reciprocal Enforcement) Act 1992 s 1(2), Sch 1 para 18). This is without prejudice to the generality of the power to make rules under the Magistrates' Courts Act 1980 s 144 (as amended) (see MAGISTRATES vol 29(2) (Reissue) para 588); Maintenance Orders (Reciprocal Enforcement) Act 1972 s 38A(1) (as added). Rules made under the Magistrates' Courts Act 1980 s 144 (as amended) may make provision, not covered by the Maintenance Orders (Reciprocal Enforcement) Act 1972 s 38A(1) (as added), for the purpose of giving effect to Pt II (as amended), which falls within the Children Act 1989 s 93(2) (as amended) and which may be made in relation to relevant proceedings within s 93 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 207); Maintenance Orders (Reciprocal Enforcement) Act 1972 s 38A(2) (as so added).

UPDATE

334 Magistrates' courts rules

TEXT AND NOTES--For 'Rules made under the Magistrates Courts Act 1980' read 'Rules of court': 1972 Act s 38A (amended by the Courts Act 2003 (Consequential Amendments) Order 2004, SI 2004/2035).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(4) MAINTENANCE ORDERS AND OTHER FINANCIAL RELIEF/ (iii) Enforcement of Maintenance Orders/E. RECOGNITION AND ENFORCEMENT UNDER THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS/335. Recognition and enforcement of maintenance orders under the 'Brussels I' Regulation and Brussels and Lugano Conventions.

E. RECOGNITION AND ENFORCEMENT UNDER THE 'BRUSSELS I' REGULATION AND THE BRUSSELS AND LUGANO CONVENTIONS

335. Recognition and enforcement of maintenance orders under the 'Brussels I' Regulation and Brussels and Lugano Conventions.

Where an application is made under the 'Brussels I' Regulation or the Brussels or Lugano Convention¹ for the recognition or enforcement in the United Kingdom² of a maintenance order³, the function of transmitting such an application to the magistrates' court having jurisdiction in the matter⁴ must be discharged in England by the Lord Chancellor⁵. An application must be determined in the first instance by the prescribed officer⁶ of that court⁷.

Where, on such an application under the Conventions⁸, the enforcement of the order is authorised to any extent, the order must to that extent be registered in the prescribed manner⁹ in that court¹⁰. On such an application under the 'Brussels I' Regulation, the order is simply registered in the prescribed manner in that court¹¹. A maintenance order so registered under the Conventions or under the Regulation (as the case may be) is of the same force and effect, and the registering court has the same powers as to enforcement, and proceedings relating to its enforcement may be taken, as if it had originally been made by the registering court¹².

A maintenance order which is enforceable by a magistrates' court is enforceable as a magistrates' court maintenance order made by that court¹³.

The payer under a maintenance order so registered in a magistrates' court in England must give notice of any change of address to the proper officer¹⁴ of that court¹⁵.

Interest on arrears of sums payable under a maintenance order registered under the provisions described above in a magistrates' court in England is not recoverable in that court¹⁶.

Sums payable in the United Kingdom under a maintenance order by virtue of registration under these provisions¹⁷, including any arrears, must be paid in sterling¹⁸. When they are expressed in any other currency, they must be converted on the basis of the exchange rate prevailing on the date of registration¹⁹.

1 le under art 38 of the 'Brussels I' Regulation or art 31 of the Brussels or Lugano Convention: see para 192 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. See also para 183 ante. As to references to numbered articles of the Conventions see para 65 note 8 ante.

2 For the meaning of 'United Kingdom' see para 4 ante.

3 As to the meanings of 'maintenance order' see art 32 of the 'Brussels I' Regulation and art 25 of the Conventions; the Civil Jurisdiction and Judgments Act 1982 s 15(1); and the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 para 1. For the meaning of 'maintenance' and 'maintenance creditor' see para 92 note 3 ante.

4 Civil Jurisdiction and Judgments Act 1982 s 5(1) (amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 3 para 2; and the Transfer of Functions (Magistrates' Courts and Family Law) Order 1992, SI 1992/709, art 4(7)); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 paras 3(1), (2). 'Appropriate court' means the magistrates' court having jurisdiction in the matter in accordance with art 32 para 2 of the Brussels

and Lugano Conventions: Civil Jurisdiction and Judgments Act 1982 s 5(1). In relation to the 'Brussels I' Regulation, jurisdiction is determined in accordance with art 39 (see para 192 ante).

5 Civil Jurisdiction and Judgments Act 1982 s 5(1); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 3(1). As to the meanings of 'England', 'English' and 'English law' see para 4 ante. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

6 *le the justices' clerk*: Magistrates' Courts (Civil Jurisdiction and Judgments Act 1982) Rules 1986, SI 1986/1962, r 3 (amended by SI 2002/194).

7 Civil Jurisdiction and Judgments Act 1982 s 5(2); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 3(2).

8 For the meaning of 'the Conventions' see para 65 note 5 ante.

9 See the Magistrates' Courts (Civil Jurisdiction and Judgments Act 1982) Rules 1986, SI 1986/1982, r 4 (amended by SI 2001/615), r 4(1A) (added by SI 2002/194).

10 Civil Jurisdiction and Judgments Act 1982 s 5(3).

11 See the Magistrates' Courts (Civil Jurisdiction and Judgments Act 1982) Rules 1986, SI 1986/1982, r 4 (amended by SI 2001/615), r 4(1A) (added by SI 2002/194).

12 Civil Jurisdiction and Judgments Act 1982 s 5(4); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 3(3). In the case of the 'Brussels I' Regulation, this is subject to art 47 (see para 194 ante), to the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 5 (see para 191 ante) and to any provision made by rules of court as to the manner in which and conditions subject to which an order so registered may be enforced: Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 3(4). In the case of the Conventions, this is subject to art 39 thereof (see para 194 ante), to the Civil Jurisdiction and Judgments Act 1982 s 7 (see para 191 ante) and to any provision made by rules of court as to the manner in which and conditions subject to which an order so registered may be enforced: s 5(5).

13 Civil Jurisdiction and Judgments Act 1982 s 5(5A) (added by the Family Law Reform Act 1987 s 33(1), Sch 2 para 89; and amended by the Maintenance Enforcement Act 1991 s 10, Sch 1 para 21); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 3(5). 'Magistrates' court maintenance order' has the same meaning as in the Magistrates' Courts Act 1980 s 150(1) (definition as added) (see MAGISTRATES vol 29(2) (Reissue) para 820); and the Magistrates' Courts Act 1980 ss 76, 93 (both as amended) (enforcement of judgment and complaint for arrears) (see MAGISTRATES vol 29(2) (Reissue) paras 829, 831) are subject, in this regard, to the modifications made by the Civil Jurisdiction and Judgments Act 1982 s 5(5B) (as added and amended) and s 5(5C) (as added): Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 3(5); Civil Jurisdiction and Judgments Act 1982 s 5(5A) (as so added and amended).

14 'Proper officer' means, in relation to a magistrates' court in England, the justices' chief executive for the court: Civil Jurisdiction and Judgments Act 1982 s 5(8) (added by the Access to Justice Act 1999 s 90(1), Sch 13 para 122); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 3(8).

15 Civil Jurisdiction and Judgments Act 1982 s 5(7) (amended by the Access to Justice Act 1999 Sch 13 para 122(3)); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 3(7). Failure without reasonable excuse to do so is an offence punishable on summary conviction with a fine not exceeding level 2 on the standard scale: Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 3(7); Civil Jurisdiction and Judgments Act 1982 s 5(7) (amended by virtue of the Criminal Justice Act 1982 s 46). As to the standard scale see para 295 note 7 ante.

16 Civil Jurisdiction and Judgments Act 1982 s 7(4); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 5(3). This is without prejudice, however, to the operation of the Maintenance Orders Act 1958 s 2A (as added) (recovery of interest on re-registration in the High Court) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 673); Civil Jurisdiction and Judgments Act 1982 s 7(4); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 5(3). Except in this regard, interest is only payable under s 7 (see para 191 ante): Civil Jurisdiction and Judgments Act 1982 s 7(5); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 5(4).

17 *le the Civil Jurisdiction and Judgments Act 1982 s 5 or the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 3.*

18 Civil Jurisdiction and Judgments Act 1982 s 8(1); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 6(1).

19 Civil Jurisdiction and Judgments Act 1982 s 8(2); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 6(2). For this purpose, a written certificate purporting to be signed by an officer of any bank in the United Kingdom, stating the exchange rate prevailing on a specified date, is evidence of the facts stated: Civil Jurisdiction and Judgments Act 1982 s 8(3); Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, Sch 1 para 6(3).

UPDATE

335 Recognition and enforcement of maintenance orders under the 'Brussels I' Regulation and Brussels and Lugano Conventions

NOTE 13--1982 Act s 5(5B) amended: Courts Act 2003 Sch 8 para 268.

NOTE 14--For 'justices' chief executive' read 'designated officer': SI 2001/3939 Sch 1 para 3(8) (amended by SI 2005/617).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/ (5) LEGITIMACY, LEGITIMATION AND PARENTAGE/336. Jurisdiction to grant declarations of parentage.

(5) LEGITIMACY, LEGITIMATION

336. Jurisdiction to grant declarations of parentage.

The English court¹ has jurisdiction to entertain an application from any person for a declaration that a person named in the declaration is or was the parent of another person so named². Such an application may be entertained if, and only if, either of the persons named therein:

- 358 (1) is domiciled³ in England on the date of the application⁴; or
- 359 (2) has been habitually resident⁵ in England throughout the period of one year ending with that date⁶; or
- 360 (3) died before that date and either was at death domiciled in England, or had been habitually resident there throughout the period of one year ending with the date of death⁷.

Except where the declaration sought is as to whether or not:

- 361 (a) the applicant is the parent of a named person⁸; or
- 362 (b) a named person is the parent of the applicant⁹; or
- 363 (c) a named person is the other parent of a named child of the applicant¹⁰,

the court must refuse to hear such an application unless it considers that the applicant has a sufficient personal interest in the determination of the application¹¹. The court may refuse to hear such an application where one of the persons named therein is a child and the court considers that the determination of the application would not be in the best interests of the child¹². Where a court refuses to hear an application, it may order that the applicant may not apply again for the same declaration without permission of the court¹³.

However, where, on an application to a court for such a declaration, the truth of the proposition to be declared is proved to the satisfaction of the court, the court must make that declaration unless to do so would manifestly be contrary to public policy¹⁴.

A declaration binds the Crown and all other persons¹⁵.

Where such a declaration is made by a court, the prescribed officer of the court¹⁶ must notify the Registrar General, in such a manner and within such period as may be prescribed, of the making of that declaration¹⁷.

1 The High Court, a county court or a magistrates' court: Family Law Act 1986 s 55A(1) (s 55A added by the Child Support, Pensions and Social Security Act 2000 s 83(1), (2)).

2 See the Family Law Act 1986 s 55A(1) (as added: see note 1 supra). See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 121. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 For the meaning of 'domicile' see para 35 ante.

4 Family Law Act 1986 s 55A(2)(a) (as added: see note 1 supra).

5 As to the meaning of 'habitually resident' see *Kapur v Kapur* [1984] FLR 920; and paras 59-61 ante.

- 6 Family Law Act 1986 s 55A(2)(b) (as added: see note 1 supra).
- 7 Ibid s 55A(2)(c) (as added: see note 1 supra).
- 8 Ibid s 55A(4)(a) (as added: see note 1 supra).
- 9 Ibid s 55A(4)(b) (as added: see note 1 supra).
- 10 Ibid s 55A(4)(c) (as added: see note 1 supra).
- 11 Ibid s 55A(3) (as added: see note 1 supra). This provision is expressed to be subject to the Child Support Act 1991 s 27 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 553): Family Law Act 1986 s 55A(3) (as so added).
- 12 Ibid s 55A(5) (as added: see note 1 supra).
- 13 Ibid s 55A(6) (as added: see note 1 supra).
- 14 Ibid s 58(1) (amended by the Child Support, Pensions and Social Security Act 2000 s 83(5), Sch 8 paras 3, 7(a)). See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 381.
- 15 Family Law Act 1986 s 58(2). At any stage of the proceedings, the court may, of its own motion or on the application of any party, direct that all necessary papers in the matter be sent to the Attorney General, who may, whether or not he is sent papers, intervene in the proceedings, and argue before the court any question in relation to the application which the court considers it necessary to have fully argued: see s 59 (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 381.
- 16 'Prescribed' means prescribed by rules of court: ibid s 42(1). See the Family Proceedings Rules 1991, SI 1991/1247, r 3.13 (added by SI 2001/821; and amended by SI 2003/184). The 'prescribed officer' means (in relation to the principal registry) the family proceedings department manager, or (in relation to any other court or registry) the court manager, or any other officer of the court or registry acting on his behalf in accordance with directions given by the Lord Chancellor: see the Family Proceedings Rules 1991, SI 1991/1247, r 1.2; definition applied by r 3.13(4) (added by SI 2003/184). As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.
- 17 Family Law Act 1986 s 55A(7) (as added: see note 1 supra). As to the office of Registrar General for England and Wales see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) para 605 et seq.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/ (5) LEGITIMACY, LEGITIMATION AND PARENTAGE/337. Jurisdiction to grant declarations of legitimacy.

337. Jurisdiction to grant declarations of legitimacy.

The English court¹ has jurisdiction to grant a declaration that the applicant is the legitimate child of his parents² if the applicant is domiciled in England on the date of the application or has been habitually resident³ there throughout the period of one year ending with that date⁴.

Where on an application to a court for such a declaration the truth of the proposition to be declared is proved to the satisfaction of the court, the court must make that declaration unless to do so would manifestly be contrary to public policy⁵.

A declaration binds the Crown and all other persons⁶.

1 The High Court or a county court: Family Law Act 1986 s 56(1) (s 56 substituted by the Family Law Reform Act 1987 s 22; and the Family Law Act 1986 s 56(1) amended by the Child Support, Pensions and Social Security Act 2000 s 83(5), Sch 8 paras 3, 5(a)). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See the Family Law Act 1986 s 56(1) (as substituted and amended: see note 1 supra); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 122.

3 As to the meaning of 'habitually resident' see *Kapur v Kapur* [1984] FLR 920; and para 59 ante.

4 Family Law Act 1986 s 56(3) (as substituted: see note 1 supra).

5 Ibid s 58(1) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 8 paras 3, 7(a)). See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 381.

6 Family Law Act 1986 s 58(2). At any stage of the proceedings, the court may, of its own motion or on the application of any party, direct that all necessary papers in the matter be sent to the Attorney General, who may, whether or not he is sent papers, intervene in the proceedings, and argue before the court any question in relation to the application which the court considers it necessary to have fully argued: see s 59; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 381.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/ (5) LEGITIMACY, LEGITIMATION AND PARENTAGE/338. Legitimacy.

338. Legitimacy.

All persons born or conceived in lawful wedlock, no matter where, are prima facie legitimate in England¹. This test of legitimacy may involve questions as to the validity of a marriage or divorce which will be decided by the English court on the principles already described².

A person may also be recognised by the English court as being legitimate if he is so regarded by the law of the domicile of each of his parents at the date of his birth³, notwithstanding the lack of a valid marriage between those parents.

A person may also be recognised as legitimate if:

- 364 (1) he is the child of a void marriage⁴ and, at the time of the insemination resulting in the birth, or, where there was no such insemination, the child's conception, or at the time of the celebration of the marriage if later, both or either of his parents reasonably believed that the marriage was valid⁵; and
- 365 (2) his father was domiciled in England at the time of the birth or, if he died before the birth, was so domiciled immediately before his death⁶.

It is immaterial that the belief that the marriage was valid was due to a mistake as to law⁷. It is presumed in respect of a child born after 4 April 1988⁸ that, unless the contrary is shown, one of the parties did believe at the relevant date that the marriage was valid⁹.

1 *Re Bozzelli's Settlement, Husey-Hunt v Bozzelli* [1902] 1 Ch 751. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. As to the presumption of legitimacy see the Family Law Reform Act 1969 s 26; and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) paras 94-97. As to the legitimacy of children of a polygamous marriage see para 239 ante.

2 See paras 208-240, 244-260 ante. See also *Shaw v Gould* (1868) LR 3 HL 55; *Brook v Brook* (1861) 9 HL Cas 193; *Re De Wilton, De Wilton v Montefiore* [1900] 2 Ch 481; *Re Stirling, Stirling v Stirling* [1908] 2 Ch 344; *Re Paine, Re Williams, Griffith v Waterhouse* [1940] Ch 46. The judgment in *Hashmi v Hashmi* [1972] Fam 36, [1971] 3 All ER 1253, in so far as it suggests that it is sufficient if the marriage is recognised as valid by the law of the father's domicile, is inconsistent with *Shaw v Gould* supra, and the case appears to have been decided per incuriam.

3 *Re Bischoffsheim, Cassel v Grant* [1948] Ch 79, [1947] 2 All ER 830. It is submitted that the proposition in this case that this is the only test of legitimacy is untenable in the light of *Shaw v Gould* (1868) LR 3 HL 55. See also *Fenton v Livingstone* (1859) 3 Macq 497, HL; and Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 857-863.

4 A 'void marriage' means a marriage, not being voidable only, in respect of which the High Court has or had jurisdiction to grant a decree of nullity, or would have or would have had such jurisdiction if the parties were domiciled in England: Legitimacy Act 1976 s 10(1). As to the legitimacy of the children of a voidable marriage which was annulled on or before 31 July 1971 see the Matrimonial Causes Act 1973 s 16, Sch 1 para 12.

5 Legitimacy Act 1976 s 1(1) (amended by the Family Law Reform Act 1987 s 28(1)). This provision is retrospective as to status but not as to rights of succession: Legitimacy Act 1976 s 11(1), Sch 1 paras 3, 4(1).

6 Ibid s 1(2).

7 Ibid s 1(3) (s 1(3), (4) added by the Family Law Reform Act 1987 s 28(2)).

8 Ie the date of coming into force of the Family Law Reform Act 1987 s 28: see the Family Law Reform Act 1987 (Commencement No 1) Order 1988, SI 1988/425.

9 Legitimacy Act 1976 s 1(4) (as added: see note 7 supra).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/ (5) LEGITIMACY, LEGITIMATION AND PARENTAGE/339. Jurisdiction to grant declarations of legitimation.

339. Jurisdiction to grant declarations of legitimation.

The English court¹ has jurisdiction to grant a declaration that the applicant has or has not become a legitimated person² if he is domiciled in England on the date of the application or has been habitually resident³ there throughout the period of one year ending with that date⁴.

Where on an application to a court for such a declaration the truth of the proposition to be declared is proved to the satisfaction of the court, the court must make that declaration unless to do so would manifestly be contrary to public policy⁵.

A declaration binds the Crown and all other persons⁶.

1 The High Court or a county court: Family Law Act 1986 s 56(2) (s 56 substituted by the Family Law Reform Act 1987 s 22; and the Family Law Act 1986 s 56(2) amended by the Child Support, Pensions and Social Security Act 2000 s 83(5), Sch 8 paras 3, 5(a)). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See the Family Law Act 1986 s 56(2) (as substituted and amended: see note 1 supra). See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 122. 'Legitimated person' means a person legitimated or recognised as legitimated under the Legitimacy Act 1976 s 2 or s 3, or under the Legitimacy Act 1926 s 1 or s 8 (repealed), or by a legitimation (whether or not by virtue of the subsequent marriage of his parents) recognised by the law of England and effected under the law of another country: Family Law Act 1986 s 56(5) (as substituted: see note 1 supra).

3 As to the meaning of 'habitually resident' see *Kapur v Kapur* [1984] FLR 920; and para 59 ante.

4 Family Law Act 1986 s 56(2), (3) (as substituted: see note 1 supra).

5 Ibid s 58(1) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 8 paras 3, 7(a)). See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 381.

6 Family Law Act 1986 s 58(2). At any stage of the proceedings, the court may, of its own motion or on the application of any party, direct that all necessary papers in the matter be sent to the Attorney General, who may, whether or not he is sent papers, intervene in the proceedings, and argue before the court any question in relation to the application which the court considers it necessary to have fully argued: see s 59 (amended by the Child Support, Pensions and Social Security Act 2000 Sch 8 paras 3, 8); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 124.

UPDATE

339 Jurisdiction to grant declarations of legitimation

NOTE 2--Family Law Act 1986 s 56(5) amended: Human Fertilisation and Embryology Act 2008 Sch 6 para 23.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/ (5) LEGITIMACY, LEGITIMATION AND PARENTAGE/340. Legitimation at common law.

340. Legitimation at common law.

Persons who are illegitimate at birth may be legitimated by subsequent events. At common law, if the father is domiciled both at the time of the child's birth and at the time of his subsequent marriage to the child's mother in a foreign country whose law permits legitimation by subsequent marriage, the child is recognised in England as having been legitimated¹. It seems that a similar principle applies to legitimation by parental recognition². If the child is legitimated by a foreign statute permitting legitimation by subsequent marriage, and his parents were married before the statute came into operation, it seems that it is sufficient if the father was domiciled in the foreign country at the time of the child's birth and at the time of the subsequent marriage; it is not necessary that he should have been domiciled there, or alive, when the statute came into operation³.

1 *Re Goodman's Trusts* (1881) 17 ChD 266, CA; *Re Wright's Trusts* (1856) 2 K & J 595; *Re Grove, Vaucher v Treasury Solicitor* (1888) 40 ChD 216, CA. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Re Luck's Settlement Trusts, Re Luck's Will Trusts, Walker v Luck* [1940] Ch 864, [1940] 3 All ER 307, CA.

3 *Re Hagerbaum, Bond v Pidding* [1933] IR 198. Cf the British Nationality Act 1981 s 47(2): see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/ (5) LEGITIMACY, LEGITIMATION AND PARENTAGE/341. Legitimation under the Legitimacy Act 1976.

341. Legitimation under the Legitimacy Act 1976.

Where the parents of an illegitimate person marry one another and, at the time of the marriage, the father of the illegitimate person is domiciled in England¹, that person, if living, is deemed legitimate from the date of the marriage².

Where the parents of an illegitimate person marry one another and, at the time of the marriage, the father of the illegitimate person is domiciled in a foreign country by the law of which the illegitimate person became legitimated by virtue of that subsequent marriage, that person, if living, is recognised in England as having been so legitimated from 1 January 1927 or, if his father or mother was married to a third person when he was born, from 29 October 1959³, or from the date of the marriage, whichever last happens, notwithstanding that his father was not at the time of that person's birth domiciled in a country in which legitimation by subsequent marriage was permitted by law⁴. This provision applies only to legitimation by subsequent marriage. It does not abrogate the common law rule⁵. Accordingly, if the father was domiciled in a foreign country whose law permits legitimation by subsequent marriage not only at the time of the marriage but also at the time of the child's birth, the child will be recognised as having been legitimated both at common law and under the Legitimacy Act 1976⁶.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 Legitimacy Act 1976 s 2.

3 Ibid s 11, Sch 1 para 1(1) (preserving the effect of the repealed Legitimacy Act 1926 s 1 (as amended by the Legitimacy Act 1959 ss 1, 6(3))).

4 Legitimacy Act 1976 ss 3, 11(1), Sch 1 para 1(1) (preserving the effect of the repealed Legitimacy Act 1926 s 8(1)).

5 See para 340 ante.

6 See *Re Askew, Marjoribanks v Askew* [1930] 2 Ch 259; *Re Hurl, Angelini v Dick* [1952] Ch 722, [1952] 2 All ER 322.

UPDATE

341 Legitimation under the Legitimacy Act 1976

TEXT AND NOTE 2--See also Legitimacy Act 1976 s 2A (added by Human Fertilisation and Embryology Act 2008 Sch 6 para 16) (legitimation by subsequent civil partnership of parents).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/ (5) LEGITIMACY, LEGITIMATION AND PARENTAGE/342. Succession by and to legitimated persons.

342. Succession by and to legitimated persons.

A person who is recognised as having been legitimated at common law¹ or under the Legitimacy Act 1976² and any other person can succeed to property under English wills and intestacies and take property under English deeds as if the legitimated person³ had been born legitimate⁴. This rule is subject to any contrary intention in the will or deed, and applies only where the testator or intestate dies, or the deed is executed, on or after 1 January 1976⁵.

These rules are subject to minor exceptions as to titles of honour and property limited to devolve with such a title⁶, and succession to the throne⁷.

1 See para 340 ante.

2 See para 341 ante.

3 For the meaning of 'legitimated person' see para 339 note 2 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 See the Legitimacy Act 1976 ss 5(1), (3), 10(1).

5 See *ibid* s 5(1), 10(1), (3).

6 See *ibid* s 11(1), Sch 1 para 4(2), (3). See *Re Moynihan* [2000] 1 FLR 113, HL (succession to a barony was limited to legitimate heirs, which discriminated against illegitimate children but did not affect the pretender's human rights because the right to succeed to a title, unlike the right to succeed to land, had no economic value and such a claim had been defined by the European Commission as a matter of public law rather than a civil right).

7 See the Legitimacy Act 1976 Sch 1 para 5.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(6) ADOPTION/343. Jurisdiction.

(6) ADOPTION

343. Jurisdiction.

The English court¹ has jurisdiction to make an adoption order when the applicant (or, in the case of an application by a married couple, at least one of the applicants) is domiciled in some part of the United Kingdom or the Isle of Man or one of the Channel Islands, and the child is in England when the application is made². In addition, the High Court has jurisdiction when the above requirements, other than those as to the residence of the child, are satisfied, and the child is resident outside Great Britain³.

In certain cases of international adoptions the Adoption Act 1976 confers an extended jurisdiction upon the High Court, giving effect to the Convention on Protection of Children and Co-operation in respect of Intercountry Adoptions⁴. This extended jurisdiction does not apply where the applicant or applicants and the child are United Kingdom nationals⁵ and are living in the United Kingdom⁶.

1 I.e. the Family Division of the High Court, certain county courts, or a magistrates' court within whose district or area the child is: see the Adoption Act 1976 s 62(1), (2) (as amended). As from a day to be appointed, the Adoption Act 1976 s 62 (as amended) is repealed by the Adoption and Children Act 2002 s 139(3), Sch 5. At the date at which this volume states the law, no such day had been appointed. The Adoption and Children Act 2002 provides that 'court' is to mean, subject to any provision made by virtue of the Children Act 1989, Sch 11 Pt 1 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 208), the High Court, a county court or a magistrates' court: see the Adoption and Children Act 2002 s 144. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See the Adoption Act 1976 ss 14(2), 15(2), 62(2) (as amended). As from a day to be appointed, these provisions are repealed by the Adoption and Children Act 2002 Sch 5. At the date at which this volume states the law, no such day had been appointed. For the meaning of 'United Kingdom' see para 4 ante.

The Adoption and Children Act 2002 provides that, subject to various conditions as to the age and status of the applicant or applicants, the English court has jurisdiction to make an adoption order only when: (1) the applicant (or, in the case of an application by a couple, at least one of the applicants) is domiciled in some part of the United Kingdom or the Isle of Man or one of the Channel Islands; or (2) both of the couple (or the applicant, in the case of adoption by one person) have been habitually resident there for a period of not less than one year ending with the date of the application: see s 49(1)-(3) (not yet in force). Such an application can be made only in respect of a child who has not reached the age of 18 years on the date of application: s 49(4) (not yet in force). The child must have had his home with the applicant or applicants for a prescribed minimum period of time; and the court must be satisfied that sufficient opportunities have been given to see the child with the applicant or the applicants together in the home environment: see s 42 (not yet in force). At the date at which this volume states the law, no day had been appointed for the commencement of these provisions.

3 See the Adoption Act 1976 s 62(3). As to the prospective repeal of s 62 see note 1 supra. For the meaning of 'Great Britain' see para 4 ante.

4 I.e. the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague, 29 May 1993 TS 40 (1994); Cm 2691): Adoption (Intercountry Aspects) Act 1999 s 1. See the Adoption Act 1976 s 17 (as substituted), s 72(1). The provisions of the Adoption Act 1976 s 17 (as substituted) and s 72(1), to the extent that it relates to s 17 (as substituted), are prospectively repealed by the Adoption and Children Act 2002 Sch 5. The Adoption and Children Act 2002 makes provision in relation to international adoptions: see ss 88-91 (not yet in force). At the date at which this volume states the law, no day had been appointed for the repeal of the Adoption Act 1976 s 17 (as substituted), s 72(1), or for the commencement of the Adoption and Children Act 2002 ss 88-91.

5 'United Kingdom national' for these purposes means a citizen of the United Kingdom and colonies satisfying such conditions, if any, as the Secretary of State may by order specify: Adoption Act 1976 s 72(1).

See BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) para 7. As to the Secretary of State see para 126 note 1 ante. As to the prospective repeal of s 72 see note 4 supra.

6 See the Adoption Act s 17(2) (as substituted), s 72(1); the Convention Adoption (Miscellaneous Provisions) Order 1978, SI 1978/1432, art 5. As to the prospective repeal of these provisions see note 4 supra.

UPDATE

343 Jurisdiction

TEXT AND NOTES 1, 2, 4--2002 Act s 139(3), Sch 5 now in force: SI 2005/2897.

NOTE 4--2002 Act ss 88-91 now in force: SI 2005/2213.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(6) ADOPTION/344. Relevance of foreign law.

344. Relevance of foreign law.

Before making an adoption order, the court must give first consideration to the need to safeguard and promote the welfare of the child¹. In considering this, the court must examine the likelihood of the order being recognised in foreign countries with which the child is, or may be, connected. The countries are those in which the child is or may be domiciled, or of which he is a national, or in which he was at some recent date ordinarily resident². Possible non-recognition of the order in those countries must be weighed against the advantages of making the order; in some cases the possibility of non-recognition will be ignored, as the welfare of the child clearly requires the making of the order³.

1 See the Adoption Act 1976 s 6 (prospectively repealed by the Adoption and Children Act 2002 s 139(3), Sch 5). The Adoption and Children Act 2002 provides that the welfare of the child is the paramount consideration in coming to a decision relating to the adoption of a child: see s 1 (not yet in force). At the date at which this volume states the law, no day had been appointed for the repeal of the Adoption Act 1976 s 6 or for the commencement of the Adoption and Children Act 2002 s 1. See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 327.

2 *Re B (S) (An Infant)* [1968] Ch 204, [1967] 3 All ER 629. As to ordinary residence see para 58 ante.

3 *Re B (S) (An Infant)* [1968] Ch 204, [1967] 3 All ER 629, citing *Re R (Adoption)* [1966] 3 All ER 613, [1967] 1 WLR 34 (refugee never likely to return to his original country).

UPDATE

344 Relevance of foreign law

NOTE 1--Day now appointed for repeal and commencement: SI 2005/2897. As to Adoption and Children Act 2002 s 1 see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 327-330.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(6) ADOPTION/345. Recognition of adoptions granted in the British Isles.

345. Recognition of adoptions granted in the British Isles.

Adoption orders made in Scotland, Northern Ireland, the Channel Islands or the Isle of Man will be recognised in England¹.

¹ See the Adoption Act 1976 s 38(1)(c). As to the meanings of 'England', 'English' and 'English law' see para 4 ante. As from a day to be appointed, the definition of adoption given in the Adoption and Children Act 2002 s 66 will have effect (but it will continue to include adoption orders made in Scotland, Northern Ireland, the Channel Islands or the Isle of Man). At the date at which this volume states the law, no such day had been appointed. See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 375.

UPDATE

345 Recognition of adoptions granted in the British Isles

TEXT AND NOTES--Day now appointed: SI 2005/2213.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(6) ADOPTION/346. Recognition of foreign orders under the Adoption Act 1976.

346. Recognition of foreign orders under the Adoption Act 1976.

The Adoption Act 1976 empowers the Secretary of State to specify certain adoptions effected under the law of any country outside Great Britain as 'overseas adoptions' for the purposes of the Act¹.

A number of adoptions have been designated as overseas adoptions for this purpose, namely, adoptions of persons under 18 and who have not been married, effected in one of certain listed countries under the law in force in the relevant country².

¹ See the Adoption Act 1976 ss 38(1)(d), 72(1), (2) (as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 375. For the meaning of 'Great Britain' see para 4 ante. As to the Secretary of State see para 126 note 1 ante. The Adoption and Children Act 2002 makes provision as to the requirements that must be met by an adoption of any description for it to be an overseas adoption for the purposes of that Act: see s 87(2) (not yet in force). At the date at which this volume states the law, no day had been appointed for the commencement of s 87. See also CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 485. As to declarations concerning the validity of overseas adoptions, and as to determinations made in Convention countries see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) para 381.

² See the Adoption (Designation of Overseas Adoptions) Order 1973, SI 1973/19 (amended by SI 1993/690). This also makes provision for proof of overseas adoptions: see the Adoption (Designation of Overseas Adoptions) Order 1973, SI 1973/19, art 4. The 'law' of a country does not include customary or common law: art 3(3). The listed countries are:

- 127 (1) the following Commonwealth countries and British overseas territories: Australia, Bahamas, Barbados, Bermuda, Botswana, British Honduras, British Virgin Islands, Canada, Cayman Islands, Cyprus, Dominica, Fiji, Ghana, Gibraltar, Guyana, Hong Kong, Jamaica, Kenya, Lesotho, Malawi, Malaysia, Malta, Mauritius, Montserrat, New Zealand, Nigeria, Pitcairn, St Christopher, Nevis and Anguilla, St Vincent, Seychelles, Singapore, Southern Rhodesia, Sri Lanka, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Uganda, Zambia (art 3(2), Schedule Pt I (art 3(2) amended by SI 1993/690; and the Adoption (Designation of Overseas Adoptions) Order 1973, SI 1973/19, Schedule Pt I amended by the British Overseas Territories Act 2002 s 2(3)); and
- 128 (2) the following other countries and territories: Austria, Belgium, the People's Republic of China, Denmark (including Greenland and the Faroes), Finland, France (including Réunion, Martinique, Guadeloupe and French Guyana), Germany (the former Federal Republic and the former West Berlin), Greece, Iceland, Republic of Ireland, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, South Africa and South West Africa, Spain, Sweden, Switzerland, Turkey, the United States of America and the former Yugoslavia (Adoption (Designation of Overseas Adoptions) Order 1973, SI 1973/19, art 3(2), Schedule Pt II (art 3(2) as so amended)).

UPDATE

346 Recognition of foreign orders under the Adoption Act 1976

NOTE 1--2002 Act s 87(2) now in force: SI 2005/2213.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(6) ADOPTION/347. Recognition of other foreign adoptions.

347. Recognition of other foreign adoptions.

A foreign adoption order not entitled to recognition under the rules previously discussed¹ will be recognised in England if it was made in the country in which the adopter was then domiciled². It may be a condition for recognition that the child should have been resident in the same country at the time of the order³.

Such a foreign adoption may be refused recognition on the ground that its recognition would be contrary to English public policy⁴.

1 See paras 345-346 ante.

2 *Re Valentine's Settlement, Valentine v Valentine* [1965] Ch 831, [1965] 2 All ER 226, CA; *Re G (Foreign Adoption: Consent)* [1995] 2 FLR 534. See the Adoption Act 1976 s 38(1)(e), by which an adoption recognised by the law of England and effected under the law of any other country is included in the meaning of adoption for the purpose of provisions affecting status. As from a day to be appointed, the definition of adoption given in the Adoption and Children Act 2002 s 66(1)(e) will have effect (but it will preserve the effect of the Adoption Act 1976 s 38(1)(e)). At the date at which this volume states the law, no such day had been appointed. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 This was required by Lord Denning MR in *Re Valentine's Settlement, Valentine v Valentine* [1965] Ch 831 at 843, [1965] 2 All ER 226 at 230-231, CA; but doubted by Dankwerts LJ at 846 and 233.

4 *Re Valentine's Settlement, Valentine v Valentine* [1965] Ch 831, [1965] 2 All ER 226, CA; *Re Wilson, Grace v Lucas* [1954] Ch 733 at 741, [1954] 1 All ER 997 at 999-1000. As to public policy see para 31 ante.

UPDATE

347 Recognition of other foreign adoptions

NOTE 2--2002 Act s 66 now in force: SI 2005/2213.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/5. FAMILY LAW/(6) ADOPTION/348. Succession by and to adopted persons.

348. Succession by and to adopted persons.

A person whose adoption is recognised in England¹ (and any other person) can succeed to property as if the adopted person had been born to the adopter or adopters in wedlock and as if he were not the child of any other person². This is, however, subject to any contrary intention in the deed or will and does not apply when the testator or intestate died or the deed was executed before 1 January 1976³ or if the succession is governed by foreign law⁴.

1 See paras 345-347 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See the Adoption Act 1976 ss 38(1), 39, 42, Sch 2 para 6 (ss 38, 39 as amended); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) paras 378-379.

3 See *ibid* ss 39(6), 42(1).

4 As to the circumstances in which this will be so see paras 443, 447-464 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/6. CONTRACTUAL OBLIGATIONS/(1) INTRODUCTION/349. Determination of the governing law.

6. CONTRACTUAL OBLIGATIONS

(1) INTRODUCTION

349. Determination of the governing law.

The principles of jurisdiction¹ decide which court will entertain a case but other rules decide which system of law will be applied in the forum.

In the case of most contracts made after 1 April 1991 the question of which law is to govern the obligations of the parties will be answered by the rules of the Rome Convention signed by the United Kingdom on 7 December 1981². Subject to certain limitations, the Rome Convention has force of law in the United Kingdom³. Accordingly, and save as expressly stated to the contrary, the applicable law⁴ is that derived from the Rome Convention. Under the Rome Convention, the applicable law is the domestic system of law identified as such, other than its rules of private international law; no renvoi is permitted to the law of another country in order that this law should govern the contract *ab initio*⁵.

Those cases to which the Rome Convention does not extend⁶ are governed by the rules of the common law, which have otherwise been replaced by the Rome Convention⁷.

1 See para 62 et seq ante.

2 The Convention on the Law applicable to Contractual Obligations (Rome, 19 June 1980; Cmnd 8489): see the Contracts (Applicable Law) Act 1990 s 1(a). The Rome Convention provides that it is to remain in force for ten years, and, if there has been no denunciation, it is to be tacitly renewed every five years thereafter: see art 30 paras 1, 2. As to the scope of application of the Rome Convention see note 6 infra; and para 350 post.

Further supplementary Conventions have been made:

- 129 (1) on the accession to the Rome Convention of Greece ('the Luxembourg Convention'), signed by the United Kingdom on 10 April 1984 (see the Contracts (Applicable Law) Act 1990 s 1(b));
- 130 (2) on the accession to the Rome Convention of Spain and Portugal ('the Funchal Convention'), signed by the United Kingdom on 18 May 1992 (see the Contracts (Applicable Law) Act 1990 s 1(d) (added by the Contracts (Applicable Law) Act 1990 (Amendment) Order 1994, SI 1994/1900, art 3)); and
- 131 (3) on the accession to the Rome Convention of Austria, Finland and Sweden ('the 1996 Accession Convention'), signed by the United Kingdom on 29 November 1996 (see the Contracts (Applicable Law) Act 1990 s 1(e) (added by the Contracts (Applicable Law) Act 1990 (Amendment) Order 2000, SI 2000/1825, art 3)).

A Protocol ('the Brussels Protocol') on the interpretation of the Rome Convention by the European Court was opened for signature in Rome on 19 June 1980 (OJ L48, 20.02.89, p 1) and signed by the United Kingdom in Brussels on 19 December 1988: see the Contracts (Applicable Law) Act 1990 s 1(c). However, at the date at which this volume states the law, the Brussels Protocol was not yet in force. See further para 350 note 2 post. A second Protocol, also opened for signature in Rome on 19 June 1980 and signed by the United Kingdom in Brussels on 19 December 1988 (OJ L48, 20.02.89, p 17), is not scheduled to the Contracts (Applicable Law) Act 1990.

These Conventions and the Brussels Protocol are together referred to in the Contracts (Applicable Law) Act 1990 as 'the Conventions': Contracts (Applicable Law) Act 1990 s 1 (amended by the Contracts (Applicable Law) Act 1990 (Amendment) Order 1994, SI 1994/1900, art 4). The English text of the Conventions is set out in the Schedules to the Contracts (Applicable Law) Act 1990: see s 2(4) (amended by the Contracts (Applicable Law) Act 1990 (Amendment) Order 1994, SI 1994/1900, arts 5, 6; and the Contracts (Applicable Law) Act 1990 (Amendment) Order 2000, SI 2000/1825, art 4). The Rome Convention is set out in the Contracts (Applicable

Law) Act 1990 Sch 1 (amended by the Contracts (Applicable Law) Act 1990 (Amendment) Order 1994, SI 1994/1900, art 7; and the Contracts (Applicable Law) Act 1990 (Amendment) Order 2000, SI 2000/1825, art 5); the Luxembourg Convention is set out in the Contracts (Applicable Law) Act 1990 Sch 2; the Brussels Protocol is set out in the Contracts (Applicable Law) Act 1990 Sch 3 (amended by the Contracts (Applicable Law) Act 1990 (Amendment) Order 2000, SI 2000/1825, art 6); the Funchal Convention is set out in the Contracts (Applicable Law) Act 1990 Sch 3A (added by the Contracts (Applicable Law) Act 1990 (Amendment) Order 1994, SI 1994/1900, art 9, Schedule); and the 1996 Accession Convention is set out in the Contracts (Applicable Law) Act 1990 Sch 3B (added by the Contracts (Applicable Law) Act 1990 (Amendment) Order 2000, SI 2000/1825, art 7, Schedule).

The Contracts (Applicable Law) Act 1990 came into force on 1 April 1991, except for s 2(1) (in so far as it relates to the Brussels Protocol) and s 3(1), (2), (3)(b), which are to come into force on a day to be appointed: Contracts (Applicable Law) Act 1990 s 7; Contracts (Applicable Law) Act 1990 (Commencement No 1) Order 1991, SI 1991/707. At the date at which this volume states the law, no such day has been appointed.

Any member state may request the revision of the Rome Convention, for which purpose the President of the Council of the European Communities must convene a conference: see art 26.

3 Contracts (Applicable Law) Act 1990 s 2(1). This, however, is still not in force in so far as it relates to the Brussels Protocol: see note 2 *supra*. The Rome Convention art 7(1) (see para 357 note 3 *post*) and art 10(1)(e) (see para 365 notes 9-10 *post*) do not have the force of law in the United Kingdom: Contracts (Applicable Law) Act 1990 s 2(2). The power to reserve the right not to apply those provisions, and to withdraw such reservation, is conferred by the Rome Convention art 22 paras 1, 3.

4 See paras 350-356 *post*.

5 Rome Convention art 15. As to the doctrine of *renvoi* generally see para 6 *et seq ante*. The parties themselves may nevertheless agree to change the applicable law: see para 351 *post*. *Renvoi* is also excluded by the common law rules: see *Re United Railways of the Havana and Regla Warehouses Ltd* [1960] Ch 52 at 96-97, [1959] 1 All ER 214 at 236, CA, per Jenkins LJ, and at 115 and 246 per Willmer LJ (*affd sub nom Tomkinson v First Pennsylvania Banking and Trust Co* [1961] AC 1007, [1960] 2 All ER 332, HL); *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50, [1983] 2 All ER 884, HL.

6 The Rome Convention does not apply to contracts made on or before 1 April 1991: art 17; Contracts (Applicable Law) Act 1990 s 7; Contracts (Applicable Law) Act 1990 (Commencement No 1) Order, SI 1991/707. For contracts made after 1 April 1991, the Rome Convention is nevertheless irrelevant to those contracts excluded from its scope by art 1 para 2 (see para 350 *post*).

7 Because the common law rules apply only to a very small number of cases, which diminishes with time, the legacy of case law is referred to in this title only where it may be useful in illustrating what may happen under the Contracts (Applicable Law) Act 1990; it cannot be regarded as decisive in matters governed by the Rome Convention. For a full exposition of the law as it applied prior to the Rome Convention see Dicey and Morris *The Conflict of Laws* (11th Edn, 1987) pp 1161-1253.

Where a reference is made to the 'proper law of the contract', this means the law which governs the contract as it is determined by the rules of the common law.

UPDATE

349 Determination of the governing law

NOTE 2--Contracts (Applicable Law) Act 1990 s 2(1) (in so far as it relates to the Brussels Protocol) and s 3(1), (2), (3)(b) now in force: SI 2004/3448. Nothing, in relation to England and Wales, in the Contracts (Applicable Law) Act 1990 applies to affect the determination of issues relating to contractual obligations which fall to be determined under the European Parliament and EC Council Regulation 593/2008 (OJ L177, 4.7.2008, p 6): Contracts (Applicable Law) Act 1990 s 4A (added by SI 2009/3064).

NOTE 7--See *King v Brandywine Reinsurance Co* [2005] EWCA Civ 235, [2005] 1 Lloyd's Rep 655.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/6. CONTRACTUAL OBLIGATIONS/(2) DETERMINATION AND APPLICATION OF THE GOVERNING LAW UNDER THE ROME CONVENTION/350. Application of the Rome Convention.

(2) DETERMINATION AND APPLICATION OF THE GOVERNING LAW UNDER THE ROME CONVENTION

350. Application of the Rome Convention.

The Rome Convention applies only to contracts made after 1 April 1991¹. It applies to contractual obligations² in any situation involving a choice between the laws of different countries³. For this purpose, where a state comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit is considered as a country for the purpose of identifying the applicable law⁴. Conflicts of laws as between the laws of England, Scotland and Northern Ireland are resolved by the rules of the Rome Convention⁵.

The Convention does not apply to the following matters, even if they are contractual in nature⁶:

- 366 (1) questions involving the status or legal capacity of natural persons⁷;
- 367 (2) contractual obligations relating to wills and succession, rights in property arising out of a matrimonial relationship, rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations of children who are not legitimate⁸;
- 368 (3) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character⁹;
- 369 (4) arbitration agreements and agreements on the choice of court¹⁰;
- 370 (5) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body¹¹;
- 371 (6) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party¹²;
- 372 (7) the constitution of trusts and the relationship between settlors, trustees and beneficiaries¹³; and
- 373 (8) evidence and procedure¹⁴.

The Convention does not apply to insurance of risks within the European Community, but it does apply to reinsurance contracts¹⁵.

Since it is concerned with contractual obligations, the Convention does not apply to property rights, nor to intellectual property¹⁶.

The Convention applies in modified form in relation to certain kinds of contracts, notably certain consumer contracts and contracts of employment¹⁷.

The Convention does not affect the application of provisions laying down choice of law rules contained in acts of the institutions of the European Union, or in national laws harmonised in implementation of such acts¹⁸; nor does it prejudice the application of international conventions to which a contracting state is or becomes a party¹⁹.

1 Rome Convention art 17; Contracts (Applicable Law) Act 1990 s 7; Contracts (Applicable Law) Act 1990 (Commencement No 1) Order, SI 1991/707. As to the Rome Convention see para 349 note 2 ante.

2 The term 'contractual obligations' refers to an autonomous or independent concept of 'contract' under the Rome Convention which is not necessarily coterminous with the concept of contract in English law. Accordingly, the law governing an obligation will be that specified as applicable by the Rome Convention, notwithstanding that as a matter of English law the obligation might be seen as not being contractual but rather might be considered to be equitable or to be enforceable under the law of tort: see Case 34/82 *Peters v ZNAV* [1983] ECR 987, ECJ; Case C-26/91 *Jakob Handte GmbH v Traitements Mécano-chimiques des Surfaces* [1992] ECR I-3967, ECJ; and the Official Report on the Rome Convention prepared by Professor Mario Giuliano and Professor Paul Lagarde (OJ C282, 31.10.80, p 1) pp 10-11. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

In the interpretation and application of the rules of the Rome Convention, the Convention itself specifies that courts must have regard to their international character, and to the desirability of achieving uniformity in their interpretation and application: see art 18. In ascertaining the meaning or effect of any provision of the Rome Convention, the court is permitted to have regard to the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1): Contracts (Applicable Law) Act 1990 s 3(3)(a). The Contracts (Applicable Law) Act 1990 also provides that the court may have regard to any official report on the Brussels Protocol which may be published in the Official Journal of the European Community: Contracts (Applicable Law) Act 1990 s 3(3)(b) (not yet in force: see para 349 note 2 ante). As to the Brussels Protocol see para 349 note 2 ante.

The Brussels Protocol (which at the date at which this volume states the law, had not been given force of law in the United Kingdom: see para 349 note 2 ante) confers certain powers on the European Court to interpret the Conventions and to give a preliminary ruling on certain matters, pursuant to a request from the House of Lords or any other court in the United Kingdom from which no further appeal is possible, if that court considers that a decision on the question is necessary to enable it to give judgment in a case before it: see the Brussels Protocol art 2 (not yet in force); and Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1201-1203. The Contracts (Applicable Law) Act 1990 provides that if an English court does not make a reference to the European Court in accordance with the Brussels Protocol, it must nevertheless interpret the meaning or effect of the Rome Convention in accordance with principles laid down by, and any relevant decision of, the European Court (see the Contracts (Applicable Law) Act 1990 s 3(1) (not yet in force: see para 349 note 2 ante)), and it must take judicial notice of decisions or expressions of opinion by the European Court concerning any question as to the meaning or effect of any provision of the Rome Convention (see the Contracts (Applicable Law) Act 1990 s 3(2) (not yet in force: see para 349 note 2 ante)). As to the meaning of 'European Court' see para 68 note 2 ante. For the meaning of 'United Kingdom' see para 4 ante.

As to 'matters relating to a contract' as the phrase is defined for the purposes of the Brussels Convention (and hence the 'Brussels I' Regulation) see para 90 ante; and Case 34/82 *Peters v ZNAV* supra; Case C-26/91 *Jakob Handte GmbH v Traitements Mécano-chimiques des Surfaces* supra. As to the Brussels Convention see para 65 note 2 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante.

3 Rome Convention art 1 para 1. Any law specified by the Convention must be applied whether or not it is the law of a contracting state: art 2. The Convention has universal application in the sense that it applies not only in situations involving some form of connection with a contracting state but also to nationals of non-contracting states and to persons domiciled or resident therein (to the extent that any dispute involving them is to be tried in a contracting state): see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) pp 8, 13.

4 Rome Convention art 19 para 1.

5 Contracts (Applicable Law) Act 1990 s 2(3). This provision applies notwithstanding the Rome Convention art 19 para 2, which provides that states within which different territorial units have their own rules of laws in respect of contractual obligations are not bound to apply the rules of the Convention to conflicts solely between the laws of such units. See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1206-1207.

6 Rome Convention art 1 para 2.

7 Ibid art 1 para 2(a). This exclusion is subject to art 11 (concerning incapacity to contract: see para 364 post), but, apart from that, the issue of capacity to contract is governed by the choice of law rules applicable to such questions under the national law of the court seised. As to the exclusion of the legal capacity of corporations see the text and note 11 infra.

8 Ibid art 1 para 2(b). In effect matters of family law are excluded from the Convention (see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) pp 10-11), and are therefore governed by the choice of law rules applicable to such questions under the national law of the court seised. As to the exclusion of wills and succession, and rights in property arising out of a matrimonial relationship, from the Brussels Convention, the Lugano Convention and the 'Brussels I' Regulation see para 74 ante. As to the Lugano Convention see para 65 note 3 ante.

9 Rome Convention art 1 para 2(c). This exclusion preserves the special rules which govern the contractual obligations arising under such instruments (as to which see also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1589 et seq). However, these obligations are excluded only if the document itself is regarded as a negotiable instrument as determined by the law of the forum (including its rules of private international law). The exclusion does not cover contracts pursuant to which such documents are issued, nor contracts for the sale and purchase of such instruments: see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 11.

10 Rome Convention art 1 para 2(d). In the United Kingdom, this means that the traditional common law rules of private international law apply to choice of court agreements, whose validity must be determined by their proper law: see *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90 at 98. For the meaning of 'the proper law (of a contract)' see para 349 note 7 ante.

The exclusion of arbitration agreements relates not only to procedural aspects but also to the formation, validity and effect of such agreements (including the questions whether they have actually been agreed to by the parties, whether they are binding upon them, and whether they can be enforced between them): see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 12. These matters fall to be determined by the court seised according to its own law rather than the law chosen, with disputes as to formation being determined according to the putative applicable law: see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 599. As to determining the choice of law relating to arbitration agreements generally see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 597-598.

It should be noted also that, where an arbitration clause forms an integral part of the contract, the exclusion relates to the clause only and not to the contract as a whole, which is still governed by the Rome Convention. Despite this exclusion, the existence of an agreed arbitration agreement or choice of court agreement may be taken into account as part of the exercise of determining the applicable law according to the Rome Convention art 3 para 1 (see para 351 post): see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 12.

11 Rome Convention art 1 para 2(e). All those complex acts relating to the creation and to the winding up of companies which fall within the scope of company law are excluded from the Rome Convention, and will be determined by the choice of law rules otherwise applicable under the law of the court seised. Between member states of the European Union, EC Council Regulation 1346/2000 on insolvency proceedings (OJ L160, 30.6.2000, p 1) (see para 473 et seq post) provides conflict of law rules which, to the extent that the Regulation applies, fill the gap left by these exclusions. However, acts or preliminary contracts between promoters with a view to forming a company are still governed by the Rome Convention. See the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 12; and para 465 et seq post. As to what constitutes 'internal organisation' see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 12.

12 Rome Convention art 1 para 2(f). The exclusion affects only the relationship between a principal and third party. Relations between agent and principal, and between agent and third party (if these may be seen as contractual) are not excluded: see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 13.

13 Rome Convention art 1 para 2(g). See the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 13; and para 424 et seq post.

14 Rome Convention art 1 para 2(h). This exclusion is subject to art 14, which provides that the applicable law applies (and hence the exclusion does not apply) to the extent that its law of contract contains rules that relate to burdens of proof and presumptions of law (see art 14 para 1), and permits a contract to be proved by any mode of proof that can be administered by the forum either under its own law or according to any of the laws which, according to art 9 (see para 363 post), determine the formal validity of the contract (see art 14 para 2). See paras 15, 17, 19 ante, 363 post.

15 See *ibid* art 1 paras 3, 4; and paras 355-356 post.

16 See the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 10. It may not be easy in practice to define what is contractual (and therefore within the Convention) and what is proprietary (and therefore outside the Convention), but it is clear that the question must be addressed in terms of what the Rome Convention considers to be contractual rather than what English law would characterise as proprietary.

Nevertheless, an action against a constructive trustee, such as an agent who has broken his fiduciary duties, may be seen either as a proprietary action brought by the beneficiary of a constructive trust or as a contractual matter since it exists only because of, and arises directly out of, the contract of agency. The exclusion of certain aspects of agency from the scope of the Convention by art 1 para 2(f) (see the text and note 12 supra) is irrelevant to this question. Further, the Convention expressly applies to the assignment of debts, and imposes the applicable law upon claims relating to: (1) the mutual obligations of assignor and assignee; and (2) the assignability of the debt and the relationship between assignee and debtor: see art 12; and para 411 post. Under the traditional view of the common law, the assignment of a debt (as distinct from the contract to assign it) was a proprietary matter, but, for the purposes of the Convention, it appears that the question is to be

treated as contractual (see para 411 post). Where a person (the creditor) has a contractual claim upon another, and a third party has a duty to satisfy the creditor or has done so in discharge of such a duty, the law governing the third person's duty determines whether he is entitled to exercise the creditor's rights against the debtor: see art 13.

17 As to consumer contracts see para 353 post. As to contracts of employment see para 354 post.

18 Rome Convention art 20. See eg the rules relating to insurance contracts; and paras 355-356 post.

19 Ibid art 21. If a contracting state wishes to become a party to a multilateral convention, a principal aim of which is to lay down rules of private international law concerning any of the matters governed by the Rome Convention, the procedure set out in the Convention itself must be followed: art 24 para 1. As to the procedure see art 23. However, this procedure need not be followed in some circumstances (eg if a contracting state is already a party to the multilateral convention): see art 24 para 2.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/6. CONTRACTUAL OBLIGATIONS/(2) DETERMINATION AND APPLICATION OF THE GOVERNING LAW UNDER THE ROME CONVENTION/351. Express choice of applicable law.

351. Express choice of applicable law.

Under the Rome Convention¹ a contract is governed by the domestic system of law chosen by the parties². Such choice must either be express³, or be demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case⁴.

The parties may at any time agree to subject the contract to a new applicable law, but any variation by the parties of the law to be applied made after the conclusion of the contract must not prejudice its formal validity⁵ or adversely affect the rights of third parties⁶.

The fact that a foreign law⁷ has been chosen as the applicable law (whether or not accompanied by the choice of a foreign tribunal⁸) must not, where all the other elements⁹ relevant to the situation at the time of choice are connected with one country only, prejudice the application of rules of law of that country which may not be derogated from by contract ('the mandatory rules')¹⁰.

It is open to the parties to agree, and open to a court to hold, that separate parts of a single contract are governed by different applicable laws¹¹.

1 As to the Rome Convention see para 349 note 2 ante.

2 Ibid art 3 para 1. See the Official Report on the Rome Convention prepared by Professor Mario Giuliano and Professor Paul Lagarde (OJ C282, 31.10.80, p 1) pp 15-18. As to the consideration which may be given to that report see para 350 note 2 ante. Choice of law means the domestic law of the system chosen, as renvoi from that law is not permitted: see para 349 text and note 7 ante. As to the position in relation to countries with more than one legal system see para 350 text and notes 4-5 ante. As to renvoi see paras 6-10 ante.

3 At common law, where the parties have expressly stipulated that a contract is to be governed by a particular law, that law (ie 'the proper law': see para 349 note 7 ante) applies so long as the selection is bona fide and legal and does not contradict public policy. For the common law authorities see *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 [1939] 1 All ER 513, PC; *Lloyd v Guibert* (1865) LR 1 QB 115; *R v International Trustee for the Protection of Bondholders AG* [1937] AC 500, [1937] 2 All ER 164, HL; *Tzortzis v Monark Line A/B* [1968] 1 All ER 949, [1968] 1 WLR 406, CA; *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, [1970] 1 All ER 796, HL. As to the relevance of the common law authorities to the interpretation of the Rome Convention see para 349 note 7 ante.

4 Ibid art 3 para 1. Courts should not infer a choice of law where the parties had no clear intention of making such a choice; art 4 (see para 352 post) should be used in those circumstances: see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 17; *Egon Oldendorff v Libera Corpn (No 2)* [1996] 1 Lloyd's Rep 380 at 388 (the Convention provides for an implied choice of law only in the sense that it is a real choice intended by the parties and is sufficiently clear from the terms of the contract itself or from the circumstances of the case). See eg *Raiffeisen Zentralbank Österreich Aktiengesellschaft v National Bank of Greece SA* [1999] 1 Lloyd's Rep 408 (no intention as to choice of law could be found in an autonomous bank to bank agreement that was independent of the surrounding transactions which gave rise to it).

Circumstances in which a real choice of law could have been made, without it being express, include:

- 132 (1) a contract on a standard form (such as a Lloyd's policy of marine insurance);
- 133 (2) a contract where there is a previous course of dealing between the parties; and
- 134 (3) the choice of a particular forum,

since, in all these cases, the applicable law is generally known: see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 17.

At common law also, the courts have been prepared to infer the intentions of both of the parties from a connection with a preceding transaction: see *The Adriatic* [1931] P 241 at 247; *The Njegos* [1936] P 90; *R v International Trustee for the Protection of Bondholders AG* [1937] AC 500 at 554, 558, [1937] 2 All ER 164 at 178, 181, HL. The courts have also inferred intentions from the form of the documents involved in the transaction: see *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, [1970] 1 All ER 796, HL; *Amin Rasheed Shipping Corp v Kuwait Insurance Co, The Al Wahab* [1984] AC 50, [1983] 2 All ER 884, HL. Under the Rome Convention, a similar inference may be drawn from the use of standard or internationally recognised clauses: see *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [1999] 2 All ER (Comm) 54, CA (a contract of reinsurance which made reference to standard form clauses commonly used in England was sufficient to demonstrate with reasonable certainty that English law was the applicable law as required by the Rome Convention art 3). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Furthermore, at common law, an agreement that the courts of a particular country are to have jurisdiction over the contract has been taken to be a strong inference that the law of that country is to be the proper law: see *Hamlyn & Co v Talisker Distillery* [1894] AC 202 at 212-213, HL; *Mackender v Feldia AG* [1967] 2 QB 590, [1966] 3 All ER 847, CA; *Hellenic Steel Co v Svolamar Shipping Co Ltd, The Komninos S* [1991] 1 Lloyd's Rep 370, CA. For the meaning of 'the proper law (of a contract)' see para 349 note 7 ante. Similarly, an arbitration clause would be seen as a strong but not conclusive indication of the proper law: *Compagnie D'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572 at 600, [1970] 3 All ER 71 at 88, HL, per Lord Wilberforce, and at 609 and 96 per Lord Diplock; *The Komninos S* [1991] 1 Lloyd's Rep 370, CA. As to the position under the Rome Convention see *Egon Oldendorff v Libera Corp (No 2)* supra at 390; and Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1230.

5 Ie under the Rome Convention art 9 (formal validity) (see para 363 post). The purpose of this restriction is to avoid doubt as to the validity of the contract during the period preceding agreement between the parties: see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 17.

6 Rome Convention art 3 para 2. There is nothing in the Convention to prevent the parties from making a valid agreement to apply a 'floating' choice of law (ie where a choice of law is made some time after the contract has been formed). Once a choice is made pursuant to such a clause, art 3 para 1 or art 3 para 2 will appear to give it effect, since the same restrictions apply (as to choice and manner of expression of that choice) as applied originally: see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) pp 17-18; and *ISS Machinery Services Ltd v Aeolian Shipping SA, The Aeolian* [2001] EWCA Civ 1162, [2001] 2 Lloyd's Rep 641.

However, this does not mean that a contract can exist without any law governing it until some event occurs which causes a particular law to apply, although it does mean that a chosen law can be varied retrospectively and it also allows for an inchoate agreement to exist which only has the full force of law and only has a choice of law made to govern it upon the happening of some act or event: *CGU International Insurance plc v Szabo* [2002] 1 All ER (Comm) 83 (in a 'global liability' contract of insurance, the idea that the definition of the insured, in the absence of an express choice of law, can be governed by different laws, dependent on the part of the world in which the claim arises, is inconsistent with the fundamental idea of a governing law).

7 It seems that the word 'foreign' means 'foreign to the country with which all other elements relevant to the situation at the time of choice are connected'. As to 'all other elements' see note 9 infra.

8 On the question whether a choice of tribunal has been made see para 350 note 10 ante.

9 It seems that 'all other elements' means 'all elements other than the choice of law'. See further the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 18.

10 Rome Convention art 3 para 3.

The definition of 'mandatory rules' given here appears to serve the needs of the Convention as a whole: see para 357 post. However, it is thought that its effect differs according to the context in which it appears. Note that the French language version (which is equally authentic: see the Rome Convention art 33) refers to 'dispositions impératives' in art 3 para 3, while art 7 is headed 'lois de police'. In the context of art 3 para 3 (and see also art 5 para 2 (see para 353 post) and art 6 para 1 (see para 354 post)), mandatory rules place limitations on the freedom of choice otherwise enjoyed when parties make an express choice of law. They operate within the chosen applicable law and consist of those rules of contract which cannot be evaded under the law of their country of origin. An example, where English law governs the contract, would be the requirement for consideration (which has no application if the contract is not subject to English law: see *Re Bonacina* [1912] 2 Ch 394). But in the context of the Rome Convention art 7 (and see also art 9 para 6 (see para 363 text and note 8 post)) rules are mandatory if they have the additional quality, under the law of their country of origin, of serving to override the applicable law (whichever that may be) in the forum. An example would be the controls in the Unfair Contract Terms Act 1977 which are expressed by s 27 (as amended) (see para 357 note 5 post) to operate even if the contract in question is not governed by English law. See Cheshire and North *Private International Law* (13th Edn, 1999) pp 575-584.

11 See the Rome Convention art 3 para 1 (see notes 1-4 supra) and art 4 para 1 (see para 352 post). However, where severability (known as *dépeçage*) of the contract exists, the choices of law must be logically consistent and must govern the different elements of the contract without giving rise to contradictions: see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 17. Although different parts of a contract could be governed by different laws, there is an objection to the 'general obligation' of the contract being governed by more than one law: see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1212-1213. See also *Centrax Ltd v Citibank NA* [1999] 1 All ER (Comm) 557; and *American Motorists Insurance Co v Cellstar Corp* [2003] EWCA Civ 206, [2003] All ER (D) 26 (Mar) (global transportation insurance contract covering the risks of a group of companies had a significant composite element which made it incapable of severance).

UPDATE

351 Express choice of applicable law

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 2--The Rome Convention does not apply to a choice between the law of a country and a non-national system of law: *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ 19, [2004] 2 All ER (Comm) 312.

NOTE 4--See *Celltech R & D Ltd v MedImmune Inc* [2004] EWCA Civ 1331, [2005] FSR 491 (parties had clearly contemplated litigation in country of patent; English courts had jurisdiction).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/6. CONTRACTUAL OBLIGATIONS/(2) DETERMINATION AND APPLICATION OF THE GOVERNING LAW UNDER THE ROME CONVENTION/352. Applicable law where the law has not been so chosen.

352. Applicable law where the law has not been so chosen.

Where the parties do not make a choice of law¹, the contract is governed by the law of the country with which it is most closely connected²; nevertheless a severable part of the contract which has a closer connection with another country may, by way of exception, be governed by the law of that other country³.

Except in the case of certain consumer contracts⁴, it is presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of the conclusion of the contract, his habitual residence (or, in the case of a body corporate or unincorporate, its central administration); but if the contract is entered into in the course of that party's trade or profession, that country will instead be the country in which the principal place of business is situated (or where, under the terms of the contract, performance is to be made through a place of business other than the principal place of business, the country in which that other place of business is situated)⁵. To the extent that the subject matter of the contract is a right in, or a right to use, immovable property, it is presumed that the contract is most closely connected with the country where the immovable is situated⁶.

Contracts for the carriage of goods (including single voyage charterparties) are not subject to the general presumption. If at the time the contract is concluded the carrier has his principal place of business in the country of loading, or of discharge, or of the consignor's principal place of business, this country is presumed to be the one with which the contract is most closely connected⁷.

The party whose performance is characteristic of the contract will be, in simple cases, the party who is to provide the goods or services for payment from the other: payment of the price is not the performance which is characteristic of the contract⁸. In more complex contractual arrangements it will be less easy to identify a characteristic performance⁹. If the characteristic performance cannot be determined, the general presumption does not apply¹⁰.

The presumptions described above may be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country¹¹.

1 To the extent that the parties have not made an express choice in relation to the contract as a whole, or to any part of it: see the Official Report on the Rome Convention prepared by Professor Mario Giuliano and Professor Paul Lagarde (OJ C282, 31.10.80, p 1) p 20. As to the consideration which may be given to that report see para 350 note 2 ante. The court may not use a partial choice of law as the basis for a presumption that the whole contract is to be governed by the same choice, as parties may have agreed to choose a law to govern one specific point only: Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 17. As to express choice of law see para 351 ante.

2 Rome Convention art 4 para 1. See *CGU International Insurance plc v Szabo* [2002] 1 All ER (Comm) 83 (where a 'global liability' insurance policy was held to be governed by English law based on the contract's closest connections). As to the Rome Convention see para 349 note 2 ante. For the official commentary on art 4 see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) pp 19-23; and as to the consideration which may be given to that report see para 350 note 2 ante. As to the meanings of 'England', 'English' and 'English law' for the purposes of this title see para 4 ante.

The nature of the enquiry under the Rome Convention art 4 is fundamentally different from the common law approach to the proper law of the contract: see eg *Crédit Lyonnais v New Hampshire Insurance Co* [1997] 2 Lloyd's Rep 1. For the meaning of 'the proper law (of a contract)' see para 349 note 7 ante. As to the test of closest connection at common law see *Boissevain v Weil* [1949] 1 KB 482 at 490, [1949] 1 All ER 146 at 153, CA

(affd [1950] AC 327, [1950] 1 All ER 728, HL); *Bonython v Commonwealth of Australia* [1951] AC 201 at 219, PC; *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, [1970] 1 All ER 796, HL; *Compagnie D'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] AC 572, [1970] 3 All ER 71, HL; *Armar Shipping Co Ltd v Caisse Algérienne d'Assurance et de Réassurance, The Armar* [1981] 1 All ER 498, [1981] 1 WLR 207, CA.

Under the Rome Convention, an English court may take account of factors that supervened after the contract was concluded in order to determine the country with which the contract is most closely connected: see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 20. This contrasts with the position at common law: see eg *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* supra; *Amin Rasheed Shipping Corp v Kuwait Insurance Co, The Al Wahab* [1984] AC 50, [1983] 2 All ER 884, HL.

If a contract can be found to be most closely connected with a country within the meaning of the Rome Convention art 4, that position can change only if it is agreed between the parties in accordance with art 3 paras 1-2 (see para 351 ante): *ISS Machinery Services Ltd v Aeolian Shipping SA, The Aeolian* [2001] EWCA Civ 1162, [2001] 2 Lloyd's Rep 641.

3 Rome Convention art 4 para 1. The words 'by way of exception' indicate that the court should have recourse to severance as seldom as possible: see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 23.

4 See the Rome Convention art 5; and para 353 post.

5 Ibid art 4 para 2. The presumption that the contract is most closely associated with the country of the principal performer's place of business can be disregarded only where clear factors favour the law of another country: *Caledonia Subsea Ltd v Micoperi Srl* 2002 SLT 1022, IH. The phrase 'under the terms of the contract' means that performance other than through the principal place of business must be required by the terms of the contract, either express or implied, and the fact that both parties merely anticipate performance of the contract through that other place does not suffice in itself to displace the presumption as to the country of closest connection: *Ennstone Building Products Ltd v Stanger Ltd* [2002] EWCA Civ 916, [2002] 2 All ER (Comm) 479, [2002] 1 WLR 3059.

6 Rome Convention art 4 para 3. See also para 401 post.

7 See ibid art 4 para 4.

8 See the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 20, suggesting that the doctrine of the characteristic performance may be applied to contracts for the delivery of goods, contracts for the right to use property, contracts for the provision of services, and contracts for transport, insurance, banking operations and security.

In a commercial contract of sale, the law of the seller's place of business will normally govern the contract: see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 21. The performance that is characteristic of a contract of sale of goods is the sale and delivery by the seller of goods, and this is not affected by the circumstance that such contracts may be part of an arrangement which would see the goods ultimately distributed to another country: *William Grant & Sons International Ltd v Marie Brizard Espana SA* 1998 SC 536, (1996) Times, 1 July, OH.

In a banking contract, the law of the country of the banking establishment with which the transaction is made will usually govern the contract: see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 21. In the case of a bank account, the characteristic performance is the repayment of the sum deposited effected by the bank through the branch in the country where the account is kept so that country's law is presumed to be the applicable law: *Sierra Leone Telecommunications Co Ltd v Barclay's Bank plc* [1998] 2 All ER 821.

As to insurance broking contracts see eg *HIB Ltd v Guardian Insurance Co Inc* [1997] 1 Lloyd's Rep 412 at 415; and as to reinsurance contracts see eg *AIG Group (UK) Ltd v The Ethniki* [1998] 4 All ER 301 at 310.

9 As between an issuing and a confirming bank, in relation to a letter of credit, the characteristic obligation is that of the confirming bank to give its confirmation and to honour the obligations thereby undertaken; it is not that of the issuing bank to indemnify the confirming bank, for this is merely consequential, not characteristic: *Bank of Baroda v Vysya Bank* [1994] 2 Lloyd's Rep 87.

10 Rome Convention art 4 para 5. The contract will then simply be governed by the law of the country with which it is most closely connected: see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 22.

11 Rome Convention art 4 para 5. This paragraph leaves the judge with a margin of discretion as to whether the non-application of the presumptions in art 4 paras 2-4 (see the text and notes 5-7 supra) can be justified. This discretion is said to be the inevitable counterpart of a general conflict rule: see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 22. For illustrations of how this discretion has been exercised see

Bank of Baroda v Vysya Bank [1994] 2 Lloyd's Rep 87; *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH* [2001] 4 All ER 283, [2001] 1 WLR 1745; *Kenburn Waste Management Ltd v Bergmann* [2002] EWCA Civ 98, (2002) Times, 4 February. Cf *Ennstone Building Products Ltd v Stanger Ltd* [2002] EWCA Civ 916, [2002] 2 All ER (Comm) 479, [2002] 1 WLR 3059.

UPDATE

352 Applicable law where the law has not been so chosen

NOTE 2--See *Zebrarise Ltd v De Niefte* [2005] 1 Lloyd's Rep 154; *FR Lurssen Werft GmbH & Co KG v Halle* [2010] All ER (D) 159 (Apr), CA.

NOTE 11--See *Marconi Communications International Ltd v Pt Pan Indonesia Bank Ltd TBK* [2005] EWCA Civ 422, [2005] 2 All ER (Comm) 325; and Case C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV* [2010] 1 All ER (Comm) 613, ECJ.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/6. CONTRACTUAL OBLIGATIONS/(3) DETERMINATION OF THE GOVERNING LAW OF PARTICULAR CONTRACTS/353. Applicable law in certain consumer contracts.

(3) DETERMINATION OF THE GOVERNING LAW OF PARTICULAR CONTRACTS

353. Applicable law in certain consumer contracts.

For these purposes, a consumer contract is one the object of which is the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for such an object¹. The provisions described below do not apply in any event to a contract of carriage², or to a contract for the supply of services to a consumer where the services are to be supplied exclusively in a country other than that in which he has his habitual residence³. But they do apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation⁴.

Notwithstanding the rules regarding the express choice of applicable law⁵, the choice of applicable law does not deprive the consumer of the protection afforded to him by the mandatory rules⁶ of the law of the country in which he has his habitual residence⁷ if one or more of the following conditions is satisfied, that is:

- 374 (1) if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising⁸, and he had taken in that country all the steps necessary on his behalf for the conclusion of the contract; or
- 375 (2) if the other party or his agent received the consumer's order in that country; or
- 376 (3) if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy⁹.

In the absence of a choice of applicable law¹⁰, notwithstanding the general provisions for determining the applicable law in the absence of such a choice¹¹, a consumer contract entered into in circumstances described in heads (1) to (3) above, will be governed by the law of the country in which the consumer has his habitual residence¹².

1 Rome Convention art 5 para 1. See also the Official Report on the Rome Convention prepared by Professor Mario Giuliano and Professor Paul Lagarde (OJ C282, 31.10.80, p 1) pp 23-25. As to the consideration which may be given to that report see para 350 note 2 ante. As to the Rome Convention see para 349 note 2 ante.

The rule does not apply to those who purchase equipment or obtain services for their trade or profession. If the purchaser acts partly within and partly outside his trade or profession, the contract will fall within these special rules only if the purchaser acted primarily outside his trade or profession. But if the supplier did not know (and had no reason to know) that the purchaser was acting outside his trade or profession, then art 5 will be inapplicable: Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 23. It is not stated whether the supplier must be acting in the course of his trade or profession in making the supply, and the question remains open.

2 Rome Convention art 5 para 4(a). Such contracts are therefore governed by the general rules in arts 3, 4 (see paras 351-352 ante): see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 24.

3 Rome Convention art 5 para 4(b). Such a contract (eg a contract for the provision of holiday hotel services) is therefore governed by the general rules in arts 3, 4: see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 24.

4 Ie a package tour contract: Rome Convention art 5 para 5; Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 25. The Rome Convention art 5 para 5 will only apply if the general criteria for treating the contract as a consumer contract (see art 5 paras 1, 2; and the text and notes 1 supra, 5-9 infra) are satisfied: Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 25.

5 Ie the provisions of the Rome Convention art 3: see para 351 ante. For the meaning of 'applicable law' see para 349 ante.

6 For the meaning of 'mandatory rules' see para 351 ante. If *ibid* art 5 does not apply (eg because the applicable law is that of a foreign country, so chosen in order to evade domestic restrictions), the consumer would still get protection from mandatory and overriding rules under art 7 para 2 (see para 357 post). Where a contract has the appropriate degree of connection with the territory of a member state of the European Union, EC Council Directive 93/13 (OJ L95, 21.4.93, p 29) on unfair terms in consumer contracts (implemented in English law as the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083: see *CONTRACT* vol 9(1) (Reissue) para 790 et seq) applies regardless of any contract terms which apply the law of a non-member state. See further para 357 post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

7 As to habitual residence see paras 59-61 ante.

8 The Rome Convention looks for initial steps that amount to a solicitation of business coming to the individual or company located within the jurisdiction: see *Rayner v Davies*[2002] 1 All ER (Comm) 620 (decided in relation to the Brussels Convention art 13 (see para 81 ante), which is directly analogous to the Rome Convention art 5; it was held that where a service is solicited by the consumer, any offer made by the service provider in response to the consumer's approach does not constitute the marketing of his services in the jurisdiction). See also paras 81, 90 ante. As to the Brussels Convention see para 65 note 2 ante.

9 Rome Convention art 5 para 2.

10 Ie in the absence of choice in accordance with *ibid* art 3.

11 Ie the provisions of *ibid* art 4: see para 352 ante.

12 *Ibid* art 5 para 3.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/6. CONTRACTUAL OBLIGATIONS/(3) DETERMINATION OF THE GOVERNING LAW OF PARTICULAR CONTRACTS/354. Applicable law in individual contracts of employment.

354. Applicable law in individual contracts of employment.

In a contract of employment¹, notwithstanding the rules regarding the express choice of applicable law², the choice of applicable law does not deprive the employee of the protection afforded to him by the mandatory rules³ of the law which would have been applicable to the contract in the absence of choice⁴.

In the absence of a choice of applicable law⁵, notwithstanding the general provisions for determining the applicable law in the absence of choice⁶, a contract of employment is governed⁷:

- 377 (1) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country⁸; or
- 378 (2) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated⁹,

unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract is governed by the law of that other country¹⁰.

1 The Rome Convention does not define 'contract of employment'; it is consequently uncertain whether, in line with other terms in the Convention, the term bears an autonomous meaning. As to the Rome Convention see para 349 note 2 ante.

2 Ie the provisions of *ibid* art 3: see para 351 ante. For the meaning of 'applicable law' see para 349 ante.

3 For the meaning of 'mandatory rules' see para 351 ante. For these purposes, the mandatory rules will be those concerning employment protection, so long as they are regarded by the law in question as of mandatory application to the facts of the given case. See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1307-1310.

4 Rome Convention art 6 para 1. See also the Official Report on the Rome Convention prepared by Professor Mario Giuliano and Professor Paul Lagarde (OJ C282, 31.10.80, p 1) pp 25-26. As to the consideration which may be given to that report see para 350 note 2 ante. The choice of law is not ineffective, but in relation to the issues to which the mandatory rules apply, the provisions of those mandatory rules override the corresponding provisions of the chosen law: see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 25.

5 Ie in the absence of choice in accordance with the Rome Convention art 3 (see para 351 ante).

6 Ie the provisions of *ibid* art 4: see para 352 ante.

7 *Ibid* art 6 para 2.

8 *Ibid* art 6 para 2(a).

9 *Ibid* art 6 para 2(b).

10 *Ibid* art 6 para 2. In relation to contracts of employment where the employee performs his duties in more than one country, 'the place ... where the employee habitually carries out his work' means the place where he had established the effective centre of his working activities and where he performed the essential part of his duties vis-à-vis his employer: see Case C-125/92 *Mulox IBC Ltd v Geels* [1993] ECR I-4075, ECJ, as applied in Case C-383/95 *Rutten v Cross Medical Ltd* [1997] All ER (EC) 121, [1997] ICR 715, ECJ (both decisions relate to

the Brussels Convention art 5 para 1 (see para 353 ante), which is directly analogous to the Rome Convention art 6 para 2). See also paras 82, 90 ante. As to the Brussels Convention see para 65 note 2 ante.

As to the position where the employment appears not to be carried out within the jurisdiction of any country see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 26; and cf *Sayers v International Drilling Co NV* [1971] 3 All ER 163, [1971] 1 WLR 1176, CA. For the problems which may arise in the application of this provision see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1310-1313.

UPDATE

354 Applicable law in individual contracts of employment

NOTE 10--See *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316, [2005] 1 All ER (Comm) 17, [2005] 1 WLR 1157.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/6. CONTRACTUAL OBLIGATIONS/(3) DETERMINATION OF THE GOVERNING LAW OF PARTICULAR CONTRACTS/355. Applicable or governing law in contracts of insurance and reinsurance.

355. Applicable or governing law in contracts of insurance and reinsurance.

The Rome Convention¹ applies to contracts of reinsurance² and to contracts of insurance where the risk is situated outside the territories of the member states of the European Union³. The law governing such contracts is accordingly that specified as applicable by the Rome Convention⁴. However, the Rome Convention does not apply to contracts of insurance that cover risks situated within the territories of the member states of the European Union⁵. In order to determine whether a risk is situated in those territories, the court must apply its internal law (rather than its rules of private international law)⁶.

In relation to a contract of general insurance⁷, where the policyholder resides⁸ in the EEA state in which the risk is situated⁹, the applicable law¹⁰ is the law of that EEA state; however, if the law of that state so allows, the parties to the contract are free to choose the law of another country¹¹. Where the policyholder does not reside in the EEA state in which the risk is situated, the parties to the contract may choose as the applicable law either the law of the EEA state in which the risk is situated, or the law of the country in which the policyholder resides¹².

Where the policyholder carries on a business¹³ and the contract covers two or more risks relating to that business which are situated in different EEA states, the parties are free to choose the applicable law of any of those EEA states or the law of the country in which the policyholder resides¹⁴.

Notwithstanding these restrictions, when the risks covered by the contract are limited to events occurring in an EEA state other than the EEA state in which the risk is situated, the parties may choose the law of the former EEA state as the applicable law¹⁵.

The parties may choose any law as the applicable law if the risk covered by the contract is a large risk¹⁶.

Where the parties to the contract choose the applicable law¹⁷, their choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case¹⁸. If this is not the case, or if no choice has been made¹⁹, the applicable law is the law of the country which is most closely connected with the contract²⁰. For these purposes, the contract is rebuttably presumed to be most closely connected with the EEA state in which the risk is situated²¹.

The fact that the parties to the contract have chosen the applicable law does not, where all the other elements relevant to the situation at the time of the choice are connected with one EEA state only, prejudice the application of the mandatory rules²² of that EEA state²³.

The applicable law for a contract of long term insurance²⁴ not governed by the Rome Convention²⁵ is the law of the EEA state of the commitment²⁶; however, if the law of that EEA state so allows, the parties may choose the law of another country as the applicable law²⁷.

Where the policyholder is an individual and resides in one EEA state but is a national or citizen of another, the parties to the contract may choose the law of the EEA state of which he is a national or citizen as the applicable law²⁸.

1 As to the Rome Convention see para 349 note 2 ante.

2 Ibid art 1 para 4. This only applies if the contract was made after 1 April 1991 (for otherwise the common law choice of law rules apply: see para 349 ante). As to reinsurance generally see INSURANCE vol 25 (2003 Reissue) para 385.

As it is inconceivable that a contract of reinsurance might be a consumer contract, a choice of law which is express or which can be demonstrated with reasonable certainty by the terms of the contract will be effective: see art 3; and para 351 ante. See also *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [1999] 2 All ER (Comm) 54, CA, where a contract of reinsurance placed in London was assumed to be based on London business practice and therefore impliedly governed by English law so that a foreign law could not apply to any part of the contract unless this was indicated in unequivocal terms in accordance with the Rome Convention art 3. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

In the absence of choice, the applicable law is determined as described in the Rome Convention art 4 (see para 352 ante). The effect of the presumption in art 4 para 2 (which provides that a contract is presumed to be most closely connected with the country of residence of the party whose performance is characteristic of the contract: see para 352 ante) is to make the applicable law that of the country where the reinsurers (being the party whose performance is 'characteristic of the contract') have their principal place of business, or the country of the place of business through which performance is to be made: *HIB Ltd v Guardian Insurance Co Inc* [1997] 1 Lloyd's Rep 412; *AIG Group (UK) Ltd v The Ethniki* [1998] 4 All ER 301.

3 This is inferred from the Rome Convention art 1 para 3, which excludes from the Convention's scope contracts of insurance where the risk is situated within the territories of the member states of the European Union: see the text and note 5 infra. As to insurance generally see INSURANCE.

4 As it is possible for a contract of insurance to be a consumer contract, the general choice of law rules contained in ibid arts 3-4 (see paras 351-352 ante) will be subject to the provisions of art 5 (which apply if the contract is a consumer contract: see para 353 ante). As regards the presumption in art 4 para 2 (see para 352 ante), the performance that is characteristic of a contract of insurance is the provision of insurance cover (see *Crédit Lyonnais v New Hampshire Insurance Co* [1997] 2 Lloyd's Rep 1); and as the insurance will be entered into in the course of the insurer's business, it will initially be presumed that the principal place of business of the insurer is the country with which the contract is most closely connected (see para 352 ante).

Contracts of reinsurance cannot be regarded as consumer contracts: see note 2 supra.

5 Rome Convention art 1 para 3.

Contracts of insurance constituting general business are subject to the choice of law rules laid down by EC Council Directive 88/357 (OJ L172, 4.7.88, p 1) ('the Second Non-Life Insurance Directive') art 7 (as amended). The differences in approach, such as they are, between the Second Non-Life Insurance Directive and the Rome Convention are discussed in *Crédit Lyonnais v New Hampshire Insurance Co* [1997] 2 Lloyd's Rep 1, CA. See also notes 20-21 infra. Contracts of insurance constituting long term business are subject to the choice of law rules laid down by EC Council Directive 2002/83 (OJ L345, 19.12.2002, p 1) art 32.

The choice of law rules contained in each directive have been implemented in English law by the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635 (amended by SI 2001/3542). See note 6 infra. The Regulations are not limited in their scope to risks situated within the territories of the member states of the European Union but include insurance policies covering risks situated within the European Economic Area. The European Economic Area ('EEA') comprises those states which are contracting parties to the Agreement on the European Economic Area (Oporto, 2 May 1992; EC 7 (1992); Cm 2183 (OJ L1, 3.1.94, p 3)) as it has effect for the time being: see the Financial Services and Markets Act 2000 s 425(1)(a), Sch 3 para 8.

6 Rome Convention art 1 para 3.

In the United Kingdom, the internal law for this purpose comprises the regulations for the time being in force under the Financial Services and Markets Act 2000 s 424(3), which provides for the Treasury to make regulations to determine the law applicable to contracts of insurance of a prescribed description (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 351): Contracts (Applicable Law) Act 1990 s 2(1A) (substituted by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 320). At the date at which this volume states the law, the regulations in force were the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635 (as amended): see the text and notes 5 supra, 7-28 infra. The Regulations do not apply to contracts of reinsurance (see note 2 supra): reg 3(1). For the meaning of 'United Kingdom' see para 4 ante.

7 'Contract of general insurance' means any contract falling within the definition given in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 1 Pt I (see INSURANCE vol 25 (2003 Reissue) para 21): Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, art 3. As to long term business see the text and notes 24-28 infra.

8 References to the country in which a person resides are: (1) if he is an individual, to the country in which he has his habitual residence; and (2) otherwise, to the country in which he has his central administration:

Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 2(3).

9 References to the EEA state where the risk covered by a contract of insurance is situated are references:

- 135 (1) where the contract relates to buildings or to buildings and their contents (in so far as the contents are covered by the same contract of insurance), to the EEA state in which the property is situated (Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 2(2)(a));
 - 136 (2) where the contract relates to vehicles of any type, to the EEA state of registration (reg 2(2)(b));
 - 137 (3) where the contract covers travel or holidays risks and has a duration of four months or less, to the EEA state in which the policyholder entered into the contract (reg 2(2)(c)); and
 - 138 (4) in any other case:
- 4. (a) where the policyholder is an individual, to the EEA state in which he resides on the date the contract is entered into (reg 2(2)(d)(i)); or
4
 - 5. otherwise, to the EEA state in which the establishment of the policyholder to which the contract relates is situated on that date (reg 2(2)(d)(ii)).
5

10 'Applicable law', in relation to a contract of insurance, means the law that is applicable to that contract: *ibid* reg 2(1).

11 *Ibid* reg 4(2).

Where an EEA state (including the United Kingdom) includes several territorial units, each of which has its own laws concerning contractual obligations, each unit is considered as a separate state for the purposes of identifying the applicable law under the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635: reg 2(4).

Nothing in the provisions relating to choice of law restricts the application of the mandatory rules of any part of the United Kingdom, irrespective of the law otherwise applicable to the contract: reg 5(1). 'Mandatory rules' means the rules from which the law allows no derogation by way of contract: reg 2(1). As to mandatory rules in the context of the Rome Convention see para 357 post.

Where the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, apply to contracts of general insurance (see the text and notes 7-10 *supra*, 12-23 *infra*) and reg 4 does not specify the applicable law, the Contracts (Applicable Law) Act 1990 is applied in order to determine the applicable law: see the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 7(1). In particular, the Contracts (Applicable Law) Act 1990 must be treated as applying to a contract in order to determine whether the mandatory rules of another EEA state should be applied (see the text and notes 22-23 *infra*) where the law otherwise applicable is the law of a part of the United Kingdom (Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 7(2)), and to determine what freedom of choice the parties have under a law of a part of the United Kingdom (reg 7(3)).

12 *Ibid* reg 4(3). Where the EEA state grants greater freedom of choice of the applicable law, the parties to the contract may take advantage of that freedom: reg 4(5).

13 'Business' includes a trade or profession: *ibid* reg 4(4).

14 *Ibid* reg 4(4). Regulation 4(5) (see note 12 *supra*) also applies. This provision in itself still envisages that only one law should govern the single contract covering all such risks: *American Motorists Insurance Co v Cellstar Corp* [2003] EWCA Civ 206, [2003] All ER (D) 26 (Mar).

15 Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 4(6).

16 *Ibid* reg 4(7). 'Large risk' is defined by EC Council Directive 73/239 (OJ L228, 16.8.73, p 3) ('the First Non-life Insurance Directive') art 5(d) (as added and amended) (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 86) and includes risks specified by paragraph (iii) of that definition insured by professional associations, joint ventures or temporary groups: Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 2(1).

17 *Ie* under *ibid* reg 4: see the text and notes 7-14 *supra*.

18 *Ibid* reg 6(1). Where the parties to the contract are free to choose the applicable law in this way, and where the risk to which the contract relates is covered by Community co-insurance (within the meaning of EC Council Directive 78/473 (OJ L151, 7.6.78, p 25) on the co-ordination of laws, regulations and administrative provisions relating to Community co-insurance), co-insurers other than the leading insurer (within the meaning of that directive: see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 101) are not to be treated as parties to the contract: Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 6(2).

19 *Ie* if either no choice has been made at all or if no choice has been made which satisfies the requirements of *ibid* reg 6(1): see the text and notes 17-18 *supra*.

20 *Ibid* reg 4(8). This country must be one from amongst those considered in the relevant paragraph of the contract ('the relevant countries'). A severable part of the contract which has a closer connection with another relevant country may, by way of exception, be governed by the law of that relevant country: reg 4(8). See *CGU International Insurance plc v Szabo* [2002] 1 All ER (Comm) 83 (the definition of the insured is not a severable part of a contract of insurance). As to severability under the Rome Convention (known as *dépeçage*) see para 351 text and note 11 *ante*.

The presumption of closest connection with the country of the insured party is one point of difference between the Second Non-life Insurance Directive and the Rome Convention (under which the closer connection would be presumed with the insurer: see art 4 para 2; and para 352 text and notes 4-5 *ante*), although both the directive and the Convention aim to identify the country with which the contract is most closely connected and only apply the 'closest connection' test in the absence of a permitted choice: *Crédit Lyonnais v New Hampshire Insurance Co* [1997] 2 Lloyd's Rep 1, CA.

21 Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 4(9). The 'rebuttable' presumption specified under the Second Non-Life Insurance Directive is stronger than the presumption specified under the Rome Convention art 4 para 2 (see para 352 text and notes 4-5 *ante*) since the policy of the directive is to make the location of the insured the primary consideration: *Crédit Lyonnais v New Hampshire Insurance Co* [1997] 2 Lloyd's Rep 1, CA (where the establishment of the policyholder, being the claimant's London office, led to the presumption that English law was the applicable law and no relevant, non-English, factor was pleaded to rebut this presumption).

22 See note 11 *supra*.

23 Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 5(2).

24 'Contract of long term insurance' means any contract falling within the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, Sch 1 Pt II (see INSURANCE vol 25 (2003 Reissue) para 21): art 3.

25 There is no express provision analogous to that regarding contracts of general insurance for determining where the risk in a contract of life or long term insurance is situated (see note 9 *supra*) and consequently whether a contract is governed by the provisions of the Rome Convention (see the text and notes 1-3 *supra*). However, the law applicable to long term business is to be determined under the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, Pt III (regs 8-10) if the policyholder is an individual resident in an EEA state, or otherwise if the establishment of the policyholder to which the contract relates is situated in an EEA state: reg 8(1). Consequently, it is thought that, as regards the exclusion of the operation of the Rome Convention (see note 5 *supra*), the risk is to be seen as being situated in a member state if the policyholder has his habitual residence or, as the case may be, the relevant place of establishment, in that state. If these conditions are met, the governing law will not be determined by the Rome Convention. But if these conditions are met, the Rome Convention will apply (provided that the contract is made after 1 April 1991: see para 349 note 2 *ante*).

26 'EEA state of the commitment', in relation to a contract of long term insurance entered into on any date, means: (1) where the policyholder is an individual, the EEA state in which he resides on that date; or (2) otherwise, the EEA state in which the establishment of the policyholder to which the contract relates was situated on that date: Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 2(1).

'Establishment', in relation to a person ('A'), means: (a) A's head office; (b) any of A's agencies; (c) any of A's branches; or (d) any permanent presence of A in an EEA state, which need not take the form of a branch or agency and which may consist of an office managed by A's staff or by a person who is independent of A but has permanent authority to act for A as if he were an agency: reg 2(1).

27 Ibid reg 8(2). Nothing in the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, Pt III affects the application of the mandatory rules of any part of the United Kingdom, irrespective of the law otherwise applicable to the contract: reg 9. See note 11 *supra*.

28 Ibid reg 8(3). Where an EEA state (including the United Kingdom) includes several territorial units, each of which has its own laws concerning contractual obligations, each unit is considered as a separate state for the purposes of identifying the applicable law under the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635: reg 2(4).

Where the regulations apply, and reg 8 does not specify the applicable law, the Contracts (Applicable Law) Act 1990 must be treated as applying to the contract in order to determine the applicable law: see the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 10(1). In particular, the Contracts (Applicable Law) Act 1990 must be treated as applying to determine what freedom of choice the parties have under a law of a part of the United Kingdom: see the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 10(2).

UPDATE

355 Applicable or governing law in contracts of insurance and reinsurance

TEXT AND NOTES--SI 2001/2635 is limited to contracts of insurance entered into before 17 December 2009: see reg 3 (amended by SI 2009/3075).

NOTE 2--As to the nature of contracts of reinsurance for applicable law purposes see *CGU International Insurance plc v AstraZeneca Insurance Co Ltd* [2005] EWHC 2755 (Comm), [2006] Lloyd's Rep IR 409.

NOTE 5--SI 2001/2635 further amended: SI 2007/2403.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/6. CONTRACTUAL OBLIGATIONS/(3) DETERMINATION OF THE GOVERNING LAW OF PARTICULAR CONTRACTS/356. Applicable or governing law in contracts of insurance entered into by friendly societies.

356. Applicable or governing law in contracts of insurance entered into by friendly societies.

A contract of insurance is not governed by the Rome Convention¹ if the risk is situated in a member state of the European Union; the court must apply its internal law to determine where the risk is situated².

Where a contract of general business³ is made by a friendly society⁴, covering risks situated in the United Kingdom⁵ or another EEA state⁶, the applicable law⁷ is determined according to the provisions described below⁸.

Where the policyholder resides⁹ in the EEA state in which the risk is situated¹⁰, the applicable law is the law of that EEA state; however, if the law of that state so allows, the parties to the contract are free to choose the law of another country¹¹. Where the policyholder does not reside in the EEA state in which the risk is situated¹², the parties to the contract may choose as the applicable law either the law of the EEA state in which the risk is situated¹³, or the law of the country in which the policyholder resides¹⁴.

Where the policyholder carries on a business¹⁵ and the contract covers two or more risks relating to that business which are situated in different EEA states, the parties are free to choose the applicable law of any of those EEA states or the law of the country in which the policyholder resides¹⁶.

Notwithstanding these restrictions, when the risks covered by the contract are limited to events occurring in one EEA state other than the EEA state in which the risk is situated, the parties may choose the law of the former EEA state as the applicable law¹⁷.

The parties may choose any law as the applicable law if the risk covered by the contract is a large risk¹⁸.

Where the parties to the contract are free to choose the applicable law¹⁹, their choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case²⁰. If this is not the case, or if no choice has been made²¹, the applicable law is the law of the country which is most closely connected with the contract²². For these purposes, the contract is rebuttably presumed to be most closely connected with the EEA state in which the risk is situated²³.

The fact that the parties to the contract choose the applicable law does not, where all the other elements relevant to the situation at the time of the choice are connected with one EEA state only, prejudice the application of the mandatory rules²⁴ of that EEA state²⁵.

Where a contract of long term business²⁶ is made by a friendly society, covering risks situated in the United Kingdom or another EEA state, the applicable law is determined according to the provisions described below²⁷.

The law applicable to the contract is the law of the EEA state of the commitment²⁸; however, if the law of that EEA state so allows, the parties may choose to apply the law of another country²⁹.

Where the policyholder is an individual and resides in one EEA state but is a national or citizen of another, the parties to the contract may choose the law of the EEA state of which he is a national or citizen as the applicable law³⁰.

- 1 As to the Rome Convention see para 349 note 2 ante.
- 2 See para 355 text and notes 1-6 ante.
- 3 For the meaning of 'general business' see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2138.
- 4 For the meaning of 'friendly society' see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2082.
- 5 For the meaning of 'United Kingdom' see para 4 ante.
- 6 For the meaning of 'EEA' see para 355 note 5 ante; 'EEA state' must be construed accordingly.
- 7 For the meaning of 'applicable law', in relation to a contract of insurance, see para 355 note 10 ante.

8 Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 4(1). Part II (regs 4-7) applies to a contract of insurance entered into by a friendly society to which the Friendly Societies Act 1992 s 37(3) applies (ie a friendly society which carries on general business and falls within the scope of the Second Non-Life Insurance Directive (a 'directive society')): Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 3(2)(a). For the meaning of 'Second Non-Life Insurance Directive' see para 355 note 5 ante. See also FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 86. As to friendly societies which are also directive societies see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2112.

In the case of a friendly society falling within the small class of friendly societies whose activities are not caught by the EC Council directives (a 'non-directive friendly society'), the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, Pt II applies to a contract of insurance entered into by the society (and which covers a risk situated in an EEA state) but with modifications: see reg 3(2)(c). In order to apply Pt II to all contracts entered into by this class (ie regardless of whether the contracts relate to general or to long term business), reg 4(1) is disapplied: reg 3(2)(c)(i).

- 9 As to the country in which a person resides see para 355 note 8 ante.

- 10 As to the EEA state where the risk covered by a contract of insurance is situated see para 355 note 9 ante.

- 11 Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 4(2). In relation to non-directive friendly societies, this provision applies only where the policyholder is an individual: see reg 3(2)(c)(ii).

Where an EEA state (including the United Kingdom) includes several territorial units, each of which has its own laws concerning contractual obligations, each unit is considered as a separate state for the purposes of identifying the applicable law under the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635: reg 2(4).

Nothing in the provisions relating to choice of law restricts the application of the mandatory rules of any part of the United Kingdom, irrespective of the law otherwise applicable to the contract: reg 5(1). For the meaning of 'mandatory rules' see para 355 note 11 ante.

Where the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, apply but reg 4 does not specify the applicable law, the Contracts (Applicable Law) Act 1990 is applied to determine the applicable law: see the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 7(1) (modified in relation to non-directive friendly societies so as to require a court in any part of the United Kingdom to apply the general rules of private international law of that part of the United Kingdom concerning contractual obligations in order to determine the applicable law: see reg 3(2)(c)(iii)).

In particular, the Contracts (Applicable Law) Act 1990 must be treated as applying to a contract in order to determine whether the mandatory rules of another EEA state should be applied (see the text and notes 24-25 infra) where the law otherwise applicable is the law of a part of the United Kingdom (Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 7(2)), and to determine what freedom of choice the parties have under a law of a part of the United Kingdom (reg 7(3)). However, in relation to non-directive friendly societies, the general rules of private international law of that part of the United Kingdom concerning contractual obligations apply to determine whether the mandatory rules of another EEA state should be applied or to determine what freedom of choice the parties have under the law of a part of the United Kingdom: see reg 3(2)(c)(iv).

- 12 Ibid reg 4(3). In relation to non-directive friendly societies, this provision applies only where the policyholder is an individual: see reg 3(2)(c)(ii).

13 Ibid reg 4(3)(a). However, where the EEA state grants greater freedom of choice of the applicable law, the parties to the contract may take advantage of that freedom: reg 4(5). In relation to non-directive friendly societies, these provisions apply only where the policyholder is an individual: see reg 3(2)(c)(ii).

14 Ibid reg 4(3)(b). In relation to non-directive friendly societies, this provision applies only where the policyholder is an individual: see reg 3(2)(c)(ii).

15 'Business' includes a trade or profession: ibid reg 4(4).

16 Ibid reg 4(4). Regulation 4(5) (see note 13 supra) also applies. In relation to non-directive friendly societies, these provisions apply only where the policyholder is an individual: see reg 3(2)(c)(ii).

17 Ibid reg 4(6). In relation to non-directive friendly societies, this provision applies only where the policyholder is an individual: see reg 3(2)(c)(ii).

18 Ibid reg 4(7).

19 Ie under ibid reg 4: see the text and notes 3-18 supra.

20 Ibid reg 6(1). Where the parties to the contract are free to choose the applicable law in this way, and where the risk to which the contract relates is covered by Community co-insurance (within the meaning of EC Council Directive 78/473 (OJ L151, 7.6.78, p 25) on the co-ordination of laws, regulations and administrative provisions relating to Community co-insurance, co-insurers other than the leading insurer (within the meaning of that directive: see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 101) are not to be treated as parties to the contract: Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 6(2).

21 Ie if either no choice has been made at all or if no choice has been made which satisfies the requirements of ibid reg 6(1): see the text and notes 19-20 supra.

22 See para 355 note 20 ante. In relation to non-directive friendly societies, this provision applies only where the policyholder is an individual: see ibid reg 3(2)(c)(ii).

23 Ibid reg 4(9). In relation to non-directive friendly societies, this provision applies only where the policyholder is an individual: see reg 3(2)(c)(ii).

24 For the meaning of 'mandatory rules' see para 355 note 11 ante.

25 Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 5(2).

26 For the meaning of 'long term business' see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2138.

27 Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 3(2)(b), which achieves this by applying Pt III (regs 8-10) to a contract of insurance entered into by a friendly society to which the Friendly Societies Act 1992 s 37(2) applies (ie a friendly society which carries on long term business and falls within the scope of EC Council Directive 79/267 of 5 March 1979 (OJ L63, 13.3.79, p1) ('the First Life Directive'): see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2112) ('a directive society'). As to friendly societies and long term business see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARAS 2096, 2138, 2147.

28 For the meaning of 'EEA state of the commitment' see para 355 note 26 ante.

29 Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 8(2). Nothing in Pt III affects the application of the mandatory rules of any part of the United Kingdom, irrespective of the law otherwise applicable to the contract: reg 9.

30 Ibid reg 8(3). Where an EEA state (including the United Kingdom) includes several territorial units, each of which has its own laws concerning contractual obligations, each unit is considered as a separate state for the purposes of identifying the applicable law under the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635: reg 2(4).

Where the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, apply but reg 8 does not specify the applicable law, the Contracts (Applicable Law) Act 1990 is applied in order to determine the applicable law: see the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 10(1). In particular, the Contracts (Applicable Law) Act 1990 must be treated as applying to determine what freedom of choice the parties have under a law of a part of the United Kingdom: see the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001, SI 2001/2635, reg 10(2).

UPDATE

356 Applicable or governing law in contracts of insurance entered into by friendly societies

TEXT AND NOTES--SI 2001/2635 is limited to contracts of insurance entered into before 17 December 2009: see reg 3 (amended by SI 2009/3075).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/6. CONTRACTUAL OBLIGATIONS/(4) LIMITATIONS ON THE OPERATION OF THE APPLICABLE LAW/(i) Mandatory Rules/357. Mandatory rules of English law.

(4) LIMITATIONS ON THE OPERATION OF THE APPLICABLE LAW

(i) Mandatory Rules

357. Mandatory rules of English law.

Whatever the law governing a contract may be, rules of English law may still be applied where these are mandatory irrespective of the law otherwise applicable to the contract¹. These mandatory rules of English law are generally referred to as 'overriding laws'². They provide an exception to the general rule that statutes apply only if they form part of the applicable law or are part of the law of the forum. Under this exception, a United Kingdom statute, which is related to contracts and is drafted with sufficient clarity, may be construed to apply (within its scope) to a contract, even one that is governed otherwise by foreign law³. Examples of such statutory provisions include the Employment Rights Act 1996⁴, the Unfair Contract Terms Act 1977⁵, and the Carriage of Goods by Sea Act 1971⁶.

1 Rome Convention art 7 para 2. As to the Rome Convention see para 349 note 2 ante. For the meaning of 'mandatory rules', and as to their effect in the context of art 3 para 3, see para 351 note 10 ante. It should be noted that art 7 has a wider scope than art 3, since it is not limited to situations where there has been an express choice of law. The effect of mandatory rules in the context of art 7 para 2 is to safeguard those rules of the law of the forum (eg rules relating to cartels, to competition and restrictive practices, and to consumer protection, and certain rules relating to carriage) that are mandatory in the situation whatever the law otherwise applicable to the contract may be: see the Official Report on the Rome Convention prepared by Professor Mario Giuliano and Professor Paul Lagarde (OJ C282, 31.10.80, p 1) p 28. As to the consideration which may be given to that report see para 350 note 2 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See generally Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 21-25.

3 See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 21-22. Further than this, the Rome Convention allows a court discretion to give effect to the mandatory rules of the law of another country with which the situation has a close connection: art 7 para 1. However, the Convention also allows a contracting state to enter a reservation against this provision (see art 22 para 1(a)), which the United Kingdom has done, so it does not have the force of law in the United Kingdom (see the Contracts (Applicable Law) Act 1990 s 2(2)). As to the enforceability of a contract that is governed by a foreign applicable law and illegal under the law of the place of performance (which is not English law) see para 361 post. For the meaning of 'United Kingdom' see para 4 ante.

An English statute may provide for a general choice of law clause which determines the applicable law in relation to a given question. An example can be found in the Bills of Exchange Act 1882 s 72 (as amended), indicating which law governs the requisites of form and the essential validity of bills of exchange: see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1591. Note, however, that obligations arising under bills of exchange, cheques and promissory notes are outside the scope of the Rome Convention: see para 350 text and note 9 ante.

4 The Employment Rights Act 1996 s 204(1) provides that for the purposes of the Act it is immaterial whether the law governing a person's contract of employment is part of the law of the United Kingdom or not: see EMPLOYMENT vol 39 (2009) PARA 2. In relation to employment contracts see also para 354 ante.

5 Express selection of a foreign law as the applicable law of a contract does not prevent the application of the Unfair Contract Terms Act 1977 where: (1) the term appears to the court or arbitrator to have been imposed wholly or mainly to evade the operation of that Act; or (2) one of the parties dealt as consumer, and was then habitually resident in the United Kingdom and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf: s 27(2). In relation to consumer contracts see also para

353 ante. As to habitual residence see paras 59-61 ante. As to the Unfair Contract Terms Act 1977 see CONTRACT vol 9(1) (Reissue) para 820 et seq.

Conversely, where the applicable law of a contract is the law of some part of the United Kingdom only by choice of the parties (and would otherwise be the law of a country outside the United Kingdom, eg where parties agree to arbitrate any dispute in England) certain provisions of that Act do not operate as part of the law applicable to the contract: s 27(1) (amended by the Contracts (Applicable Law) Act 1990 s 5, Sch 4 para 4).

6 The Carriage of Goods by Sea Act 1971 incorporates the Hague-Visby Rules into all contracts for the shipment of goods from a United Kingdom port: see s 1 (as amended); and CARRIAGE AND CARRIERS vol 7 (2008) PARA 367 et seq. See also *The Hollandia* [1983] 1 AC 565, [1982] 3 All ER 1141, HL (Hague-Visby Rules applied to proceedings in England despite the fact that Dutch law was the governing law). See, however, *Hellenic Steel Co v Svolamar Shipping Co Ltd, The Komninos S* [1991] 1 Lloyd's Rep 370, CA (where it was held that a contractual term referring disputes to the British courts did not extend the United Kingdom legislation giving effect to the Hague-Visby Rules to govern a contract which was not subject to those Rules).

UPDATE

357 Mandatory rules of English law

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/6. CONTRACTUAL OBLIGATIONS/(4) LIMITATIONS ON THE OPERATION OF THE APPLICABLE LAW/ (ii) Public Policy/358. Public policy of English law.

(ii) Public Policy

358. Public policy of English law.

The application of any rule of the applicable law¹ may be refused only if its application is manifestly² incompatible with the public policy of English law³. It is the application of the rule of the applicable law, rather than the law itself, which must give rise to the incompatibility⁴. The result may be to hold valid a contract otherwise unenforceable according to a provision of the applicable law which is offensive to English law⁵, or to regard a contract which is valid and enforceable according to its applicable law as invalid and unenforceable by reason of some dominating requirement of English public policy⁶.

1 For the meaning of 'applicable law' see para 349 ante.

2 'Manifestly' indicates that the court must have special reason for upholding an objection: Official Report on the Rome Convention prepared by Professor Mario Giuliano and Professor Paul Lagarde (OJ C282, 31.10.80, p 1) p 38. As to the consideration which may be given to that report see para 350 note 2 ante.

3 Rome Convention art 16. As to the Rome Convention see para 349 note 2 ante. Thus while an English statute may be drafted so as to override a contract not governed by English law (see para 357 ante), a rule of the common law cannot have the same effect. For a discussion of the circumstances in which art 16 applies see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1276 et seq. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 38.

5 See *Wolff v Oxholm* (1817) 6 M & S 92; *Re Friedrich Krupp AG* [1917] 2 Ch 188; *Empresa Exportadora De Azucar v Industria Azucarera Nacional SA, The Playa Larga and the Marble Islands* [1983] 2 Lloyd's Rep 171, CA; *Oppenheimer v Cattermole* [1976] AC 249, [1975] 1 All ER 538, HL; *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368, [1986] 1 All ER 129, HL; *Re Helbert Wagg & Co Ltd's Claim* [1956] Ch 323, [1956] 1 All ER 129; *Kuwait Airways Corpn v Iraqi Airways Co* [2001] 1 Lloyd's Rep 161.

It is arguable that the common law rules as to public policy that apply to contracts where English law is the governing law but where there is a foreign connecting element have been displaced by The Bretton Woods Agreements Order in Council 1946, SR & O 1946/36, but only in relation to exchange contracts and not in relation to exchange control laws that are not concerned with exchange contracts: *Ispahani v Bank Melli Iran* [1998] Lloyd's Rep Bank 133, CA.

6 *Kaufman v Gerson* [1904] 1 KB 591, CA; *Re Missouri SS Co* (1889) 42 ChD 321, CA; *Rousillon v Rousillon* (1880) 14 ChD 351; *Dynamit AG v Rio Tinto Co Ltd* [1918] AC 292, HL; *Royal Boskalis Westminster NV v Mountain* [1999] QB 674, [1997] 2 All ER 929, CA. Cf *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448, [1988] 1 All ER 513 (contract governed by English law offended general principles of morality but was not so offensive as to be unenforceable unless it was also offensive to public policy and unenforceable under Qatari law); *Trendtex Trading Corpn v Crédit Suisse* [1982] AC 679, [1981] 3 All ER 520, HL (champertous assignment of English cause of action held to be void).

UPDATE

358 Public policy of English law

NOTE 6--See also *Duarte v Black and Decker Corpn* [2007] EWHC 2720 (QB), [2008] 1 All ER (Comm) 401.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/6. CONTRACTUAL OBLIGATIONS/(4) LIMITATIONS ON THE OPERATION OF THE APPLICABLE LAW/ (iii) The Effect of Illegality/359. In general.

(iii) The Effect of Illegality

359. In general.

The Rome Convention¹, as it is given effect in English law², makes express provision for the illegality of contractual obligations only in relation to questions of material validity³, performance and non-performance⁴. Such matters fall to be dealt with under the applicable law⁵. However, a problem emerges regarding the effect of illegality under a law which is not the applicable law⁶. The following circumstances fall to be considered:

- 379 (1) where an obligation is illegal under a foreign law which is the law of the place of its performance (the *lex loci solutionis*), but the applicable law is English law⁷; and
- 380 (2) where an obligation is illegal under the foreign *lex loci solutionis*, and the applicable law is not English law⁸.

1 As to the Rome Convention see para 349 note 2 ante.

2 As to the extent to which the Rome Convention has the force of law in England see para 349 note 2 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. As to the exclusion of art 10 para 1(e) (nullity of contract) under English law see para 365 notes 9-10 post. As to the exclusion of art 7 para 1 (discretion to apply the mandatory rules of a foreign country) see note 6 infra; and para 357 note 3 ante.

3 See *ibid* art 8; and para 362 post.

4 See *ibid* art 10; and para 365 post.

5 For the meaning of 'applicable law' see para 349 ante. Accordingly, an English court will not enforce a contract which is illegal under the applicable law (being English law): see para 360 post. This is consistent with the position held at common law: see *Kahler v Midland Bank Ltd* [1950] AC 24, [1949] 2 All ER 621, HL.

See also *Fox v Henderson Investment Fund Ltd* [1999] 2 Lloyd's Rep 303 (where English law is the applicable law and England is the place of performance of the contract, an English court may enforce a contractual obligation that requires the performance of an act which is in defiance of an injunction granted by a court in a foreign jurisdiction, provided that the act is legal in the United Kingdom).

6 The exclusion from English law of the Rome Convention art 7 para 1 (see note 2 supra) has a particular bearing on this question because it is a general rule which gives effect to mandatory rules of the law of a foreign country with which the situation has a close connection, if those laws must be applied irrespective of the law governing the contract. It seems that, with art 7 para 1 denied to them, the English courts must look to the other rules of the Convention for an answer to this question, based on the assumption that the rules that governed this situation at common law, being rules of English private international law, did not survive the introduction of the Rome Convention. In particular, the rules contained in art 7 para 2 (mandatory rules of the forum: see para 357 ante), art 10 para 2 (manner of performance: see para 365 post) and art 16 (public policy: see para 358 ante) may be considered. See further Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1246-1249.

7 See para 360 post.

8 See para 361 post. Where the applicable law is not English law, but an obligation is illegal under English law as the *lex loci solutionis*, the obligation may be unenforceable either under the Rome Convention art 7 para 2 (ie by application of the mandatory rules of the forum: see para 357 ante) or under art 16 (ie by the application of English public policy: see para 358 ante): see Cheshire and North *Private International Law* (13th Edn, 1999) p 603.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/6. CONTRACTUAL OBLIGATIONS/(4) LIMITATIONS ON THE OPERATION OF THE APPLICABLE LAW/ (iii) The Effect of Illegality/360. The effect of an obligation which is illegal under a foreign *lex loci solutionis* but whose applicable law is English law.

360. The effect of an obligation which is illegal under a foreign *lex loci solutionis* but whose applicable law is English law.

Under the Rome Convention¹, the existence and validity of a contract or any contractual term are governed by the applicable law² that would govern it if the contract or contractual term were valid³. It follows that, where English law is the applicable law, initial illegality⁴ under a foreign *lex loci solutionis*⁵ may make a contract wholly unenforceable on grounds of public policy⁶; and supervening illegality⁷ may discharge a contract by frustration⁸.

1 As to the Rome Convention see para 349 note 2 ante.

2 For the meaning of 'applicable law' see para 349 ante.

3 Rome Convention art 8 para 1. Article 8 para 1 is intended to cover all aspects of formation of the contract other than general validity: see the Official Report on the Rome Convention prepared by Professor Mario Giuliano and Professor Paul Lagarde (OJ C282, 31.10.80, p 1) p 28. As to the consideration which may be given to that report see para 350 note 2 ante. As to the scope of the applicable law see the Rome Convention art 10 para 1; and para 365 post.

4 Ie where a contract is illegal ab initio. As to the meanings of 'England', 'English' and 'English law' for the purposes of this title see para 4 ante.

5 As to the *lex loci solutionis* see para 359 ante.

6 This position is consistent both with the Rome Convention art 16 (see para 358 ante) and the position that was developed at common law, whereby the English courts could refuse to enforce a contractual obligation which had been made with the real object and intention of evading the law of a foreign and friendly country where to do so would offend against English public policy, notwithstanding the fact that there may have been alternative modes or places of performing the obligation which permitted the contract to be performed legally (see *Foster v Driscoll* [1929] 1 KB 470, CA). This common law principle and the distinct (but related) principle of supervening illegality (see notes 7-8 infra) were said to have sprung from the principle of comity: *Toprak Mahsulleri Ofisi v Finagrain Cie Commerciale Agricole et Financière SA* [1979] 2 Lloyd's Rep 98 at 107 per Goff J; approved [1979] 2 Lloyd's Rep 112 at 117, CA.

7 Ie where the illegality arises only after the contract has been made.

8 See CONTRACT vol 9(1) (Reissue) para 902. Where a contractual obligation was governed by English law as the proper law and required performance of an act that was illegal under the foreign *lex loci solutionis*, it was an established principle at common law that the English courts would not enforce the contract: see *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287, CA; *De Beêche v South American Stores Ltd and Chilian Stores Ltd* [1935] AC 148 at 156, HL; *R v International Trustee for the Protection of Bondholders AG* [1937] AC 500 at 519, [1936] 3 All ER 407 at 428, CA; *Kleinwort Sons & Co v Ungarische Baumwolle Industrie AG* [1939] 2 KB 678 at 694, 697, 700, [1939] 3 All ER 38 at 42-43, 44-45, 47, CA; *Kahler v Midland Bank Ltd* [1950] AC 24 at 39, [1949] 2 All ER 621 at 631, HL; *Zivnostenska Banka National Corp v Frankman* [1950] AC 57, [1949] 2 All ER 671, HL; *Mackender v Feldia AG* [1967] 2 QB 590 at 601, [1966] 3 All ER 847 at 851-852, CA; *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448, [1988] 1 All ER 513 (where public policy under both English law and the *lex loci solutionis* rendered the contract unenforceable); *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728, [1989] 3 All ER 252; *Euro-Diam Ltd v Bathurst* [1990] 1 QB 30, [1988] 2 All ER 23, CA. However, it seems that the rule in *Ralli Bros v Compania Naviera Sota y Aznar* supra has been overtaken by the introduction of the Rome Convention: see para 361 note 6 post. For the meaning of 'the proper law (of a contract)' see para 349 note 7 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/6. CONTRACTUAL OBLIGATIONS/(4) LIMITATIONS ON THE OPERATION OF THE APPLICABLE LAW/ (iii) The Effect of Illegality/361. The effect of an obligation which is illegal under a foreign *lex loci solutionis* and whose applicable law is not English law.

361. The effect of an obligation which is illegal under a foreign *lex loci solutionis* and whose applicable law is not English law.

There was no authority at common law to determine the situation where a contractual obligation which was illegal under a foreign *lex loci solutionis*¹ was governed by a foreign applicable law². Where initial illegality³ is found, the English court may refuse to enforce the contract on grounds of public policy⁴, but it is doubtful whether the application of public policy in this context could be brought within the terms of the Rome Convention⁵.

However, it may be appropriate under the Convention to apply such rules as to illegality that are contained in the foreign *lex loci solutionis* if the issue can be classified as relating to the manner of performance⁶.

1 As to the *lex loci solutionis* see para 359 ante.

2 See, however, *Toprak Mahsulleri Ofisi v Finagrain Cie Commerciale Agricole et Financière SA* [1979] 2 Lloyd's Rep 98 at 114; *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 at 15, [1987] 2 All ER 113 at 120 (affd [1990] 1 QB 30, [1988] 2 All ER 23, CA); *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728, [1989] 3 All ER 252. The problem may be addressed by the Rome Convention art 7 para 1, which does not have the force of law in the United Kingdom: see para 357 note 3 ante. As to the Rome Convention see para 349 note 2 ante.

3 For the meaning of 'initial illegality' see para 360 note 4 ante.

4 See eg *Royal Boskalis Westminster NV v Mountain* [1999] QB 674, [1997] 2 All ER 929, CA (contract governed by French law). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

5 Ie within the terms of the Rome Convention art 16 (see para 358 ante): see Cheshire and North *Private International Law* (13th Edn, 1999) pp 602-603; and Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1249.

6 Ie within the terms of the Rome Convention art 10 para 2 (see para 365 post): see Cheshire and North *Private International Law* (13th Edn, 1999) pp 602.

The Rome Convention art 7 para 2 (see para 357 ante) can be prayed in aid only if the common law rule that deals with illegality under a foreign *lex loci solutionis* (ie the principle in *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287, CA: see para 360 note 8 ante) is regarded as part of the English domestic law of contract rather than as a rule of English private international law (and as such abolished by the Rome Convention). The exact status of this rule has never been certain. In *Kahler v Midland Bank Ltd* [1950] AC 24 at 48, [1949] 2 All ER 621 at 636, HL, Lord Reid limited the effect of illegality by the law of the place of performance to cases involving acts 'done in performance of an English contract'. However, in *Zivnostenska Banka National Corp'n v Frankman* [1950] AC 57 at 79, [1949] 2 All ER 671 at 681, HL, Lord Reid indicated that illegality by the law of the place of performance was fatal 'whatever be the proper law of the contract'. It seems that the rule has been abolished by the introduction of the Rome Convention; but see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1249, where it is submitted that the principle in *Ralli Bros v Compania Naviera Sota y Aznar* supra is part of the English domestic law of contract. The issue came up for discussion in *Ispahani v Bank Melli Iran* [1998] Lloyd's Rep Bank 133, CA, but a final view was not expressed on the point. For the meaning of 'the proper law (of a contract)' see para 349 note 7 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/6. CONTRACTUAL OBLIGATIONS/(4) LIMITATIONS ON THE OPERATION OF THE APPLICABLE LAW/(iv) Formation and Interpretation of the Contract/362. Disputes as to existence and validity.

(iv) Formation and Interpretation of the Contract

362. Disputes as to existence and validity.

The existence and validity of a contract, or any term of a contract, must be determined by the law which would be the applicable law¹ if the contract or term were valid².

However, a party may rely on the law of the country in which he has his habitual residence³ to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the applicable law⁴.

1 For the meaning of 'applicable law' see para 349 ante.

2 Rome Convention art 8 para 1. This provision applies, inter alia, where one party disputes that he gave his consent to the choice of applicable law and contends that he is not therefore bound, or when it is contended by a party that a particular term, alleged to have been agreed to, is not part of the contract. The same principle applies if it is disputed whether the parties have consented to an express choice of law within the framework of art 3 (see para 351 ante): art 3 para 4. See also the Official Report on the Rome Convention prepared by Professor Mario Giuliano and Professor Paul Lagarde (OJ C282, 31.10.80, p 1) p 28. As to the consideration which may be given to that report see para 350 note 2 ante. As to the Rome Convention see para 349 note 2 ante.

This rule is pragmatic rather than logical, in that it conditionally assumes the existence of a contract in order to determine whether there is a contract, but it is nevertheless clear, and is consistent with the previous common law on the point; the conditional assumption is made that the parties are bound as the first step in the argument. For the common law authorities see *Albeko Schihmaschinen AG v Kamborian Shoe Machine Co Ltd* (1961) 111 L Jo 519; *Compania Naviera Micro SA v Shipley International Inc, The Parouth* [1982] 2 Lloyd's Rep 351, CA; and see *Union Transport plc v Continental Lines SA* [1992] 1 All ER 161, [1992] 1 WLR 15, HL. Note, however, that disputes as to the existence or validity of a choice of court or an arbitration clause fall outside the scope of the Rome Convention: see art 1 para 2(d); and para 350 note 10 ante.

If the contract is valid and enforceable notwithstanding the alleged illegality, the contract may still be held unenforceable in England on the ground that the illegality in question is such as to make the enforcement of the contract manifestly contrary to English public policy: see para 358 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 As to habitual residence see paras 59-61 ante.

4 Rome Convention art 8 para 2. This is intended to cover, inter alia, the position where one party is silent as to the formation of the contract (such as where the applicable law provides that the effect of not communicating a response to an offer is acceptance of the offer, whereas the party acts in accordance with his own law where the effect would be rejection of the offer): see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 28. See also *Egon Oldendorff v Libera Corp* [1995] 2 Lloyd's Rep 64 (the defendants did not rely upon the Rome Convention art 8 para 2 in *Egon Oldendorff v Libera Corp* (No 2) [1996] 1 Lloyd's Rep 380).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/6. CONTRACTUAL OBLIGATIONS/(4) LIMITATIONS ON THE OPERATION OF THE APPLICABLE LAW/(iv) Formation and Interpretation of the Contract/363. Disputes as to formal validity.

363. Disputes as to formal validity.

A contract which is concluded between persons who are in the same country¹ is formally valid if it satisfies the formal requirements of its applicable law², or of the law of the country where it is concluded³. A contract which is concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of its applicable law, or of the law of one of those countries⁴. An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which is or would be the applicable law, or the law of the country where the act was done⁵.

By way of exceptions to the general rule: (1) a consumer contract of a specified kind⁶ is formally valid if and only if it is formally valid according to the law of the country in which the consumer has his habitual residence⁷; and (2) a contract the subject matter of which is a right in, or a right to use, immovable property is subject to the mandatory requirements of form of the law where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded or of the applicable law⁸.

1 Where a contract is concluded by an agent, the country in which the agent acts is the country in which the person is for the purposes of this rule: Rome Convention art 9 para 3. See also the Official Report on the Rome Convention prepared by Professor Mario Giuliano and Professor Paul Lagarde (OJ C282, 31.10.80, p 1) pp 28-32, where, at p 28, the authors decline to define 'formal validity' but consider that 'form' for the purposes of the Rome Convention art 9 includes 'every external manifestation required on the part of a person expressing the will to be legally bound, and in the absence of which such expression of will would not be regarded as fully effective'; the definition does not include the special requirements that operate where there are persons under a disability to be protected. As to the consideration which may be given to that report see para 350 note 2 ante. As to the Rome Convention see para 349 note 2 ante.

2 For the meaning of 'applicable law' see para 349 ante.

3 Rome Convention art 9 para 1. The same principle applies if it is disputed whether the parties have consented to an express choice of law within the framework of art 3 (see para 351 ante): art 3 para 4. See also the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) pp 30-31.

4 Rome Convention art 9 para 2. See also note 3 supra.

5 Ibid art 9 para 4. See also note 3 supra.

6 Ie a consumer contract falling within ibid art 5 para 2 (see para 353 ante).

7 Ibid art 9 para 5. As to habitual residence see paras 59-61 ante.

8 Ibid art 9 para 6. For the principal formal requirements of English law see the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended); and SALE OF LAND vol 42 (Reissue) para 29. Compliance with these is presumably mandatory whenever the land in question is in England. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. The wording of the Rome Convention art 9 para 6 does not make it clear whether such a contract must comply with the general formality rules described in the text and notes 1-5 supra in addition to those of the place where the immovable is situated, or whether the formal requirements of the law of that place displace, rather than add to, the operation of the general rules. See also para 401 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/6. CONTRACTUAL OBLIGATIONS/(4) LIMITATIONS ON THE OPERATION OF THE APPLICABLE LAW/(iv) Formation and Interpretation of the Contract/364. Disputes as to contractual capacity.

364. Disputes as to contractual capacity.

Subject to one specific rule¹, questions of capacity are excluded from the scope of the Rome Convention, and the issues fall to be dealt with under the common law². At common law, the capacity of an individual³ to enter into a contract is governed by the law of the country with which the contract is most closely connected or by the law of his domicile or residence. If he has contractual capacity by either of those laws, the contract will be valid in point of capacity; if he does not have contractual capacity by either of these laws, the contract will not be valid and enforceable⁴.

Under the Rome Convention, however, if a contract is concluded between persons who are in the same country, a natural person having capacity under the law of that country may invoke his own incapacity under the law of some other country⁵ only if the other party was aware (or was unaware through negligence)⁶ of the incapacity at the time of conclusion of the contract⁷.

1 le the rule in the Rome Convention art 11 (see the text and note 7 infra). As to the Rome Convention see para 349 note 2 ante.

2 Without prejudice to ibid art 11 (see the text and note 7 infra), the Rome Convention does not apply to questions involving the status or legal capacity of natural persons: art 1(2)(a).

3 For the capacity of corporations see para 470 post.

4 See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1271-1272. The proposition set out in the text is based primarily on principle because there is little modern authority. However, see *Charron v Montreal Trust Co* [1958] OR 597, 15 DLR (2d) 240, Ont CA, which decided that the proper law governed questions of capacity; and see also *Bodley Head v Flegon* [1972] 1 WLR 680 at 688, [1972] RPC 587 at 594-595, obiter, per Brightman J (the case being decided on the issue of material validity).

The general rule does not refer to the 'proper law of the contract', which might otherwise have been expected at common law, because it is believed that the parties are not competent to make an express choice of proper law and by so doing confer upon themselves a contractual capacity which they would not otherwise (that is, if the contract had been subject to the law with which it was most closely connected) have had. Hence a modified form of proper law will govern the question. For the meaning of 'the proper law (of a contract)' see para 349 note 7 ante.

Cases such as *Cooper v Cooper* (1888) 13 App Cas 88, HL, which hold that a lack of capacity to enter into a matrimonial settlement according to the law of the domicile is fatal to the validity of the contract without regard to its proper law are probably to be confined to matrimonial contracts, and treated as inapplicable to commercial contracts. Other dicta supporting the law of the domicile as the governing law (such as in *Sottomayer v De Barros* (1877) 3 PD 1 at 5, CA (criticised in *Sottomayer v De Barros (No 2)* (1879) 5 PD 94 at 100); *Re Cooke's Trusts* (1887) 56 LJCh 637 at 639; *Guépratte v Young* (1851) 4 De G & Sm 217; *Stephens v M'Farland* (1845) 81 Eq R 444) are also to be confined to cases of matrimonial capacity.

In the case of contracts relating to land, the law of the place where the land is situated is most likely to be the proper law of the contract, so that the law to govern capacity to enter into such a contract is almost certain to be the law of that place: *Bank of Africa Ltd v Cohen* [1909] 2 Ch 129, CA.

5 le the law of some country with which the contract is most closely connected or in which he is domiciled or resident (see the text and notes 3-4 supra) but which is not that of the place where the contract was concluded. There must be a conflict of laws before the Rome Convention art 11 can be applied: see the Official Report on the Rome Convention prepared by Professor Mario Giuliano and Professor Paul Lagarde (OJ C282, 31.10.80, p 1) p 34. As to the consideration which may be given to that report see para 350 note 2 ante.

6 This wording implies that the burden of proof lies on the incapacitated party to establish that the other party knew of his incapacity or should have known of it: see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 34.

7 See the Rome Convention art 11. The same principle applies if it is disputed whether the parties have consented to an express choice of law within the framework of art 3 (see para 351 ante): art 3 para 4. See also the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) pp 33-34.

UPDATE

364 Disputes as to contractual capacity

TEXT AND NOTES--The Mental Capacity Act 2005 Sch 3 makes provision in relation to persons who cannot protect their interests, governing which jurisdiction should apply when a national of one country is in another state: see Mental Capacity Act 2005 Sch 3; and PARA 14A.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/6. CONTRACTUAL OBLIGATIONS/(4) LIMITATIONS ON THE OPERATION OF THE APPLICABLE LAW/(iv) Formation and Interpretation of the Contract/365. Interpretation, performance, breach and discharge of contracts.

365. Interpretation, performance, breach and discharge of contracts.

The applicable law¹ of a contract applies in particular to²:

- 381 (1) the interpretation of the contract³;
- 382 (2) the performance of the obligations arising from the contract⁴;
- 383 (3) the consequences of breach⁵, including the assessment of damages⁶ so far as this is governed by rules of law, and within the limits of the powers conferred on the court by its procedural law⁷; and
- 384 (4) the various ways of extinguishing obligations, and prescription and limitation of actions⁸.

The provision which would have also held the applicable law to govern the consequences of nullity of the contract⁹ does not have legal effect in the United Kingdom¹⁰.

Although the text of the Rome Convention provides that the applicable law is to apply to these principal questions of interpretation, performance and non-performance, the operation of the applicable law is not confined to these issues¹¹.

1 For the meaning of 'applicable law' see para 349 ante.

2 I.e. the rule in the Rome Convention art 10 para 1. As to the Rome Convention see para 349 note 2 ante. The list set out in art 10 para 1 (see heads (1)-(4) in the text) is not exhaustive: see the Official Report on the Rome Convention prepared by Professor Mario Giuliano and Professor Paul Lagarde (OJ C282, 31.10.80, p 1) pp 32-33; and the text and note 11 infra. As to the consideration which may be given to that report see para 350 note 2 ante.

3 Rome Convention art 10 para 1(a); Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 32. It follows from this provision that if the applicable law permits matters occurring after the making of the contract to be taken into account in construing it, such matters are to be taken into account for the same purpose by an English court; contrast *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, [1970] 1 All ER 796, HL. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 Rome Convention art 10 para 1(b); Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 32. A distinction must be drawn between the substance of the obligation to perform and the manner of performance. The substance of performance (as governed by the applicable law) will cover, inter alia, the standard of care in performance, the extent to which someone other than a contracting party may perform contractual obligations, conditions as to performance in relation to joint and several obligations, alternative obligations, divisible and indivisible obligations, and pecuniary obligations: Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 32. In relation to the manner of performance, and also to the steps to be taken in the event of defective performance, regard must be had to the law of the place where performance takes place: Rome Convention art 10 para 2. This appears to indicate that a court may use its discretion as to whether to apply the law of the place where performance was due to this question.

The manner of performance, to which the *lex loci solutionis* (see para 359 ante) is relevant, includes rules governing public holidays, rules for the inspection of goods, rules upon whether notes or coins may be delivered as lawful tender, etc: Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 33.

5 The question whether the injured party may terminate the contract, or is excused from further performance, or must content himself with damages for breach, is a matter for the applicable law: Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 33.

6 In relation to the assessment of damages, matters such as the remoteness of damage, mitigation of losses, and fixed limits upon the amount of compensation, all of which may be subject to rules of law (as distinct from being questions of fact, which are determined by the *lex fori*) will be governed by the applicable law: see the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) p 33. The quantification of damages is a procedural matter for the *lex fori*: see para 22 ante. As to damages in tort see para 371 note 5 post.

7 Rome Convention art 10 para 1(c). It is unclear whether the availability of particular remedies, such as injunction and specific performance, remains a matter for the *lex fori*, or is now determined according to the applicable law. Whilst an English court will not grant a remedy unknown to it, it is uncertain whether an order for specific performance could be resisted or obtained on the sole ground that under the applicable law such a remedy would be unavailable or (as the case may be) available. In principle these matters could be seen as part of the contractual bargain made by the parties and subject to their governing law. On the other hand, the availability of remedies is in most systems of law a procedural matter (see para 22 ante); and the unspecific wording of art 10 may not be sufficient to have displaced this rule. See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1264.

8 Rome Convention art 10 para 1(d). Cf *Re United Railways of the Havana and Regla Warehouses Ltd* [1960] Ch 52, [1959] 1 All ER 214, CA; affd sub nom *Tomkinson v First Pennsylvania Banking and Trust Co* [1961] AC 1007, [1960] 2 All ER 332, HL. The Rome Convention effectively confirms the modern English statutory provision that matters of limitation and prescription are determined by the *lex causae*, here the applicable law, rather than by the law of the forum: see the Foreign Limitation Periods Act 1984; and para 26 ante. As to the *lex causae* and the law of the forum (*lex fori*) see para 11 ante. Note that under both the Rome Convention (see art 16; and para 358 ante) and the Foreign Limitation Periods Act 1984 s 2(1) (see para 26 ante) this rule may be departed from if its application would be manifestly contrary to public policy.

9 Ie the Rome Convention art 10 para 1(e).

10 Contracts (Applicable Law) Act 1990 s 2(2). The Rome Convention art 10 para 1(e) is excluded from English law, the right to recover money paid under a void contract being classified in English law not as contractual but as restitutionary: see para 379 note 4 post.

11 See the Official Report on the Rome Convention (OJ C282, 31.10.80, p 1) pp 32-33.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/7. NON-CONTRACTUAL OBLIGATIONS/(1) INTRODUCTION/366. Jurisdiction in respect of tort claims.

7. NON-CONTRACTUAL OBLIGATIONS

(1) INTRODUCTION

366. Jurisdiction in respect of tort claims.

The English court has jurisdiction in respect of torts, whether English or foreign, whenever it has jurisdiction in personam over the defendant¹. In cases to which the 'Brussels I' Regulation², the Brussels Convention³, or the Lugano Convention⁴ apply, the jurisdiction of the English court is determined according to the rules of the Regulation or the Convention, as the case may be⁵.

Where the 'Brussels I' Regulation, the Brussels Convention or the Lugano Convention authorises a court to apply its national laws of jurisdiction⁶, or where the subject matter of the dispute means that the Regulation and Conventions have no application⁷, the jurisdiction of the court will be governed by the traditional common law principles of jurisdiction in personam⁸.

By way of exception, there are special rules concerning torts in respect of foreign immovables⁹.

¹ For general principles of jurisdiction in personam see para 62 et seq ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

The rules discussed in the following paragraphs are rules of choice of law, rather than of jurisdiction: *Chaplin v Boys* [1971] AC 356 at 385-387, [1969] 2 All ER 1085 at 1098-1100, HL. It had sometimes been suggested that the rules were rules of jurisdiction, or that the rule in *The Halley* (1868) LR 2 PC 193 was such: see *Boys v Chaplin* [1968] 2 QB 1 at 21, 38, [1968] 1 All ER 283 at 287, 298, CA; on appeal sub nom *Chaplin v Boys* supra at 375 and 1090, HL. In the light of the House of Lords decision in *Chaplin v Boys* supra this suggestion is now insupportable. See also *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 446, [1989] 3 All ER 14 at 32, CA. Historically, the rules on jurisdiction in relation to tort claims drew a sharp distinction between torts which took place in England and torts which took place outside. Although this distinction no longer holds true in that context, the location of a tort is of central importance to the choice of law rules. As to the location of a tort see para 375 post.

² As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the application of the 'Brussels I' Regulation to torts see para 91 ante.

³ As to the Brussels Convention see para 65 note 2 ante. As to the application of the Brussels Convention to torts see para 91 ante.

⁴ As to the Lugano Convention see para 65 note 3 ante. As to the application of the Lugano Convention to torts see para 91 ante.

⁵ See para 91 ante.

⁶ I.e. under art 4 of the Conventions: see para 88 ante. As to references to numbered articles of the Conventions see para 65 note 8 ante.

⁷ See paras 72-74 ante.

⁸ See para 95 et seq ante.

⁹ See para 392 et seq post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/7. NON-CONTRACTUAL OBLIGATIONS/(1) INTRODUCTION/367. Choice of law for claims in tort.

367. Choice of law for claims in tort.

The rules of the common law for choice of law in tort¹ have been largely, but not entirely, superseded by Part III of the Private International Law (Miscellaneous Provisions) Act 1995². Accordingly, it is necessary for choice of law purposes to distinguish between those claims which will continue to be governed by the rules of the common law and those which will be governed by the Act.

The claims which will continue to be governed by the common law are:

- 385 (1) claims which arise from acts or omissions which occurred before the entry into force of the relevant provisions of the Act³; and
- 386 (2) defamation claims⁴.

All other tort claims and issues will be governed by the Act⁵.

1 See paras 373-377 post.

2 I.e. the Private International Law (Miscellaneous Provisions) Act 1995 Pt III (ss 9-15). The Act is based in large part on *Private International Law: Choice of Law in Tort and Delict* (Law Com no 193) (1990).

3 Private International Law (Miscellaneous Provisions) Act 1995 s 14(1). The provisions of Pt III came into force on 1 May 1996: Private International Law (Miscellaneous Provisions) Act 1995 (Commencement) Order 1996, SI 1996/995, art 2.

It is unclear whether the Private International Law (Miscellaneous Provisions) Act 1995 s 14(1) is meant to refer to a claim in which the act or omission of the defendant occurred before 1 May 1996, whenever the damage manifested itself, or only to a case in which the damage, together with the acts or omissions complained of, also occurred before the commencement date.

4 Ibid s 13(1); and see para 377 post.

5 See paras 368-372 post.

UPDATE

367 Choice of law for claims in tort

NOTE 3--The act or omission must have occurred before 1 May 1996; the date on which the damage occurred is irrelevant: *Re T&N Ltd (No 2)* [2005] EWHC 2990 (Ch), [2006] 3 All ER 755.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/7. NON-CONTRACTUAL OBLIGATIONS/ (2) TORTS GOVERNED BY THE PRIVATE INTERNATIONAL LAW (MISCELLANEOUS PROVISIONS) ACT 1995/368. Scope of the Act.

(2) TORTS GOVERNED BY THE

368. Scope of the Act.

The rules set out in Part III of the Private International Law (Miscellaneous Provisions) Act 1995¹ apply for choosing the law to be used for determining issues relating to tort (the 'applicable law')². It applies to events occurring in the forum³ as well as to events occurring in any other country⁴, but it has no application to acts or omissions giving rise to a claim which occurred before the commencement of Part III of the Act⁵, nor to defamation claims⁶.

The applicable law must be used (excluding its choice of law rules⁷) for determining the issues arising in a claim, including in particular the question whether an actionable tort has occurred⁸.

In relation to claims to which the Act applies, the rules of the common law, in so far as they:

- 387 (1) require actionability under both the law of the forum and the law of another country for the purpose of determining whether a tort is actionable (the 'double actionability rule')⁹; or
- 388 (2) allow, as an exception to the double actionability rule, for the law of a single country to be applied for the purpose of determining the issues or any of them arising in the case in question¹⁰,

are abolished¹¹.

The rules set out in Part III of the Private International Law (Miscellaneous Provisions) Act 1995 apply to any action or proceedings by or against the Crown¹² as they apply to actions and proceedings to which the Crown is not a party¹³.

1 Ie the Private International Law (Miscellaneous Provisions) Act 1995 Pt III (ss 9-15).

2 Ibid s 9(1). For the purpose of private international law the characterisation of issues arising in a claim as issues relating to tort is a matter for the courts of the forum: s 9(2).

'Issues relating to tort' is not defined. Thus it is not expressly stated whether the rules in the Act will apply to any or all of the following issues:

- 139 (1) capacity;
- 140 (2) vicarious liability;
- 141 (3) defences and immunities;
- 142 (4) some or all aspects of the law of damages;
- 143 (5) limitations on recovery;
- 144 (6) limitation of actions;
- 145 (7) transmission of claims on death and the survival of actions;
- 146 (8) wrongful death;
- 147 (9) intra-family immunities;

- 148 (10) contribution and indemnity;
- 149 (11) contractual defences to claims in tort;
- 150 (12) direct actions by a third party against an insurer; and
- 151 (13) claims against a constructive trustee on the ground of his wrongful assistance in another's fraudulent breach of trust.

The matters in heads (1)-(5) supra are regarded as matters relating to tort: see *Private International Law: Choice of Law in Tort and Delict* (Law Com no 193) (1990) paras 3.34, 3.35-3.36 3.37, 3.38, 3.39. Matters mentioned in head (6) supra are governed by the law which governs liability for the tort: see the Foreign Limitation Periods Act 1984 s 1; and para 26 ante. The silence as to heads (7), (9), (10), (11), (12) supra is deliberate: see *Private International Law: Choice of Law in Tort and Delict* (Law Com no 193) (1990) paras 3.41-3.43, 3.45-3.46, 3.49-3.50, 3.51. As to head (8) supra see *Private International Law: Choice of Law in Tort and Delict* (Law Com no 193) (1990) para 3.44. With regard to head (10) supra, it was stated by the Law Commission that such a claim for contribution was a restitutionary one, separate and distinct from the law of tort, and was for that reason intended to be omitted from the legislation: see *Private International Law: Choice of Law in Tort and Delict* (Law Com no 193) (1990) para 3.47. It has been held that a claim for contribution is governed exclusively by the Civil Liability (Contribution) Act 1978 (see DAMAGES vol 12(2) (Reissue) para 837 et seq), which applies in an English court without regard to the identity of the law chosen to determine the liabilities of the defendants to the claimant, or otherwise inter se: see *Arab Monetary Fund v Hashim (No 9)* (1994) Times, 11 October. No provision was made regarding head (13) supra in the Private International Law (Miscellaneous Provisions) Act 1995. But it was held in *Arab Monetary Fund v Hashim (No 9)* supra that where the conduct took place in a foreign country, the 'double actionability' rule (see para 375 post) governed whether a claim based on it could be brought in England. It is thought that the use of that rule does not ipso facto render this issue of liability an issue in tort, and that the result of that case is therefore unaffected by the Private International Law (Miscellaneous Provisions) Act 1995.

3 'Forum' means, as the case may be, England, Scotland or Northern Ireland: see *ibid* s 9(7). As to the meanings of 'England', 'English' and 'English law' see note 2 supra.

4 *Ibid* s 9(6).

5 See *ibid* s 14(1); and para 367 ante. The provisions of Pt III came into force on 1 May 1996: see para 367 note 3 ante.

6 See *ibid* ss 9(3), 13(1); and paras 367 ante, 377 post.

7 *Ibid* s 9(5). This excludes the doctrine of renvoi from the choice of law regime for tort, just as the Rome Convention does for contract law (see para 349 text and note 7 ante). As to the Rome Convention see para 349 note 2 ante. It may, however, be argued that, since the Private International Law (Miscellaneous Provisions) Act 1995 permits exceptions where circumstances demonstrate a close link between the tort and the law of another country (see para 370 post), an exception could be made to s 9(5) if it would be 'substantially more appropriate' to apply the choice of law rules of the applicable law. See the comments of the Lord Chancellor in the Report of the Special Public Bill Committee (1 March 1995): *Private International Law (Miscellaneous Provisions) Bill [HL]: Proceedings of the Special Public Bill Committee* (HL Paper (1994-95) no 36) Pt II col 25.

8 Private International Law (Miscellaneous Provisions) Act 1995 s 9(4).

9 *Ibid* s 10(a). See para 375 post.

10 *Ibid* s 10(b). See para 376 post.

11 *Ibid* s 10. This abolishes the common law rules regarding 'double actionability' (and exceptions to those rules) (see paras 375-376 post) to the extent that the Private International Law (Miscellaneous Provisions) Act 1995 applies, so the claimant only has to prove that the alleged tortious conduct, having occurred in England, constitutes a tort according to English domestic law if English law is selected as the applicable law under the Act. The effect of this provision is to make the choice of law regime introduced by the Private International Law (Miscellaneous Provisions) Act 1995 apply to torts committed in England as well as to those committed elsewhere: see *Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21, [2002] 1 All ER 961, [2002] 1 WLR 2304.

12 This reference to the Crown does not include Her Majesty in Her private capacity, or Her Majesty in right of Her Duchy of Lancaster, or the Duke of Cornwall: Private International Law (Miscellaneous Provisions) Act 1995 s 15(2).

13 Ibid s 15(1). These provisions do not affect any rule of law as to whether proceedings of any description may be brought against the Crown: s 15(3). As to actions or proceedings by or against the Crown see CROWN PROCEEDINGS AND CROWN PRACTICE.

UPDATE

368 Scope of the Act

TEXT AND NOTES--1995 Act s 15A (disapplication of Pt III where rules in European Parliament and EC Council Regulation 864/2007 apply) added: SI 2008/2986.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/7. NON-CONTRACTUAL OBLIGATIONS/ (2) TORTS GOVERNED BY THE PRIVATE INTERNATIONAL LAW (MISCELLANEOUS PROVISIONS) ACT 1995/369. General choice of law rule.

369. General choice of law rule.

The general rule is that the applicable law¹ is that of the country in which the events constituting the tort in question occurred (*lex loci delicti*)².

But where elements of those events occur in different countries, the applicable law under the general rule is as follows³:

- 389 (1) for a cause of action in respect of personal injury⁴ caused to an individual, or death resulting from personal injury, the law of the country where the individual was when he sustained the injury⁵;
- 390 (2) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged⁶; and
- 391 (3) in any other case, the law of the country in which the most significant elements of the events constituting the tort occurred⁷.

1 For the meaning of 'applicable law' see para 368 ante.

2 Private International Law (Miscellaneous Provisions) Act 1995 s 11(1). See eg *Glencore International AG v Metro Trading International Inc* [2001] 1 Lloyd's Rep 284 (claim for wrongful interference with goods). As to the circumstances in which the general rule can be displaced see para 370 post.

3 Private International Law (Miscellaneous Provisions) Act 1995 s 11(2).

4 'Personal injury' includes disease or any impairment of physical or mental condition: *ibid* s 11(3).

5 *Ibid* s 11(2)(a).

6 *Ibid* s 11(2)(b).

7 *Ibid* s 11(2)(c). See eg *White Sea and Onega Shipping Co Ltd v International Transport Workers' Federation, The Amur-2528 and Pyalma* [2001] 1 Lloyd's Rep 421 (allegations of economic tort were considered in the light of the Private International Law (Miscellaneous Provisions) Act 1995 s 11, but a concluded view on the choice of law was not necessary for the purpose of an interim application); *Portea Leasing Ltd v Royal Air Cambodge Co Ltd* [2002] EWHC 2731 (Comm) (application of Cambodian law caused claim to fail).

Although common law authorities (see para 374 post) can never be determinative of any issue arising under the statutory regime, they may offer guidance as to the application of the general rule. Where the constituent elements of the tort did not all occur in a single jurisdiction, the common law held that the tort occurred where in substance the cause of action arose: *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458, [1971] 1 All ER 694, PC; *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] QB 391, [1989] 3 All ER 14, CA. Thus a claim alleging product liability arose where the article was purchased without warning as to its danger and was used, and not necessarily where it was manufactured: *Distillers Co (Biochemicals) Ltd v Thompson* supra; *Castree v ER Squibb & Sons Ltd* [1980] 2 All ER 589, [1980] 1 WLR 1248, CA. A cause of action for inducing a breach of contract arose in the place where the breaches occurred and the damage was sustained, and not necessarily where the prior acts of inducement took place: *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* supra. Negligent misrepresentation occurred where the careless advice was received and acted upon, and not necessarily where it was transmitted from: *Diamond v Bank of London & Montreal* [1979] QB 333, [1979] 1 All ER 561, CA (followed in *Ennstone Building Products Ltd v Stanger Ltd* [2002] EWCA Civ 916, [2002] 2 All ER (Comm) 479, [2002] 1 WLR 3059); *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey, The Albaforth* [1984] 2 Lloyd's Rep 91, CA. However, a claim regarding the negligent production of accountancy advice may have arisen where the accountancy was performed, rather than where the information was relied upon: *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 568-569, Aust HC.

A cause of action in defamation is still governed by the common law rules: see paras 367 ante, 377 post.

UPDATE

369 General choice of law rule

NOTE 7--See also *Morin v Bonhams & Brooks Ltd* [2003] EWCA Civ 1802, [2004] 1 Lloyd's Rep 702 (negligent misstatement in auction catalogue provided in England, but purchase made in Monaco; Monegasque law applied); and *Middle Eastern Oil LLC v National Bank of Abu Dhabi* [2008] EWHC 2895 (Comm), [2009] 1 Lloyd's Rep 251, [2008] All ER (D) 285 (Nov) (bank failed to transfer money from UAE to London; tort claim in English courts precluded by exclusive jurisdiction clause).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/7. NON-CONTRACTUAL OBLIGATIONS/ (2) TORTS GOVERNED BY THE PRIVATE INTERNATIONAL LAW (MISCELLANEOUS PROVISIONS) ACT 1995/370. Displacement of the general rule.

370. Displacement of the general rule.

The applicable law¹ selected under the general choice of law rule² may be displaced by the law of another country if it appears, in all the circumstances, from a comparison of³:

- 392 (1) the significance of the factors which connect a tort with the country whose law would be the applicable law under the general rule⁴; and
- 393 (2) the significance of any other factors connecting the tort with that other country⁵,

that it is substantially more appropriate for the applicable law to be the law of that other country for the purpose of determining any, or all, of the issues arising in a case⁶.

The factors which may be taken into account as connecting a tort with a country for this purpose include⁷, in particular, factors relating to the parties, to any events which constitute the tort in question, or to any of the circumstances or consequences of those events⁸.

1 For the meaning of 'applicable law' see para 368 ante.

2 As to the general rule see para 369 ante.

3 Private International Law (Miscellaneous Provisions) Act 1995 s 12(1).

4 Ibid s 12(1)(a).

5 Ibid 12(1)(b).

6 Ibid s 12(1). The word 'substantially' indicates that the general rule should not be dislodged easily: *Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21, [2002] 1 All ER 961, [2002] 1 WLR 2304 (the fact that the victim was Dutch and that his Dutch family would suffer loss of dependency was insufficient to displace the general rule, since these were not factors connecting the tort with Holland). See, however, *Edmunds v Simmonds* [2001] 1 WLR 1003, [2001] RTR 367 (where an English claimant was injured by an English defendant whose negligent driving caused their Spanish hire car to hit a Spanish lorry whilst they were on holiday in Spain, the general rule was displaced). As to whether damages are a matter of substantive law or procedural law see para 371 note 5 post.

The use of the phrase 'any, or all, of the issues' appears to envisage that dépeçage could operate, ie different laws could apply to different issues in a case. As to the recognition of dépeçage in the choice of law rules under the Rome Convention see para 351 note 11 ante. As to the Rome Convention see para 349 note 2 ante.

7 The word 'include' indicates that the list is not exhaustive, and that (for example) the fact that the courts of the country whose law is selected by the general rule would apply the law of another country may indicate that the law of that other country should be applied in the interests of preventing 'forum shopping': see para 368 note 7 ante.

8 Private International Law (Miscellaneous Provisions) Act 1995 s 12(2). See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1552-1554.

Although the Private International Law (Miscellaneous Provisions) Act 1995 expressly provides that the applicable law is to be determined in relation to the specific issue or issues in question, it is unclear whether a court may also take into account under these provisions the fact that claims arising out of the same transaction between different parties would be governed by a different law. Although as between a single claimant and the defendant there may be no sufficient justification for departure from the general rule, it may be that when the identity of other claimants having claims arising out of the same facts is concerned, this perception may be altered: see *Private International Law: Choice of Law in Tort and Delict* (Law Com no 193) (1990) para 3.53,

where it is suggested that in a case of multiple actual parties the choice of applicable law should be made 'separately for each pair of opponents'.

UPDATE

370 Displacement of the general rule

TEXT AND NOTE 8--See *Trafigura Beheer BV v Kookmin Bank Co* [2006] EWHC 1450 (Comm), [2006] 2 All ER (Comm) 1008.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/7. NON-CONTRACTUAL OBLIGATIONS/ (2) TORTS GOVERNED BY THE PRIVATE INTERNATIONAL LAW (MISCELLANEOUS PROVISIONS) ACT 1995/371. Issues still governed by English law.

371. Issues still governed by English law.

Nothing in Part III of the Private International Law (Miscellaneous Provisions) Act 1995¹ authorises a court to apply the law of a country outside the forum² for determining issues arising in any claim where to do so would either conflict with the principles of public policy³, or give effect to a penal, revenue or other public law which would not otherwise be enforceable under the law of the forum⁴. The Private International Law (Miscellaneous Provisions) Act 1995 does not affect rules of evidence, pleading or practice, nor does it authorise questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum⁵. Any rule of law which applies notwithstanding the rules of private international law, or which modifies the rules of private international law, is not prejudiced by Part III of the Private International Law (Miscellaneous Provisions) Act 1995⁶.

1 The Private International Law (Miscellaneous Provisions) Act 1995 Pt III (ss 9-15).

2 For the meaning of 'forum' see para 368 note 3 ante.

3 Private International Law (Miscellaneous Provisions) Act 1995 s 14(3)(a)(i). As to public policy see para 31 ante.

4 Ibid s 14(3)(a)(ii). As to penal and revenue laws see paras 32-33 ante.

5 Ibid s 14(3)(b). As to procedure see paras 11-27 ante.

At common law, the question of whether a particular head of damages is recoverable is a substantive matter to be decided by the law governing the tort but, once liability has been established, quantum is a matter of procedure for the law of the forum alone: *Chaplin v Boys* [1971] AC 356, [1969] 2 All ER 1085, HL. The common law position has been preserved by the effect of the Private International Law (Miscellaneous Provisions) Act 1995 s 14(3)(b): *Hulse v Chambers* [2002] 1 All ER (Comm) 812, [2001] 1 WLR 2386. See also *Edmunds v Simmonds* [2001] 1 WLR 1003 (although this case was decided with English law as both the applicable law and the law of the forum). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

In Australia, at least in relation to torts committed wholly within the jurisdiction, it has been held that all matters affecting the rights and duties of the parties (including heads of damage and quantum) are matters of substance to be governed by the lex loci delicti (see para 369 ante): *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625, Aust HC (where it was held that the existence of a rule that places a statutory cap on damages is a substantive as opposed to a procedural matter), reconsidering *Stevens v Head* (1993) 176 CLR 433, Aust HC (where it was held that the statutory cap was procedural).

6 Private International Law (Miscellaneous Provisions) Act 1995 s 14(4). This provision relates to provisions of English law which are 'mandatory' or 'overriding' in the manner in which they apply to a case litigated in the English courts notwithstanding that the issues in the case are not otherwise governed by English law.

The Rome Convention art 7 gives similar powers to a court in the field of contract law: see para 357 ante. As to the Rome Convention see para 349 note 2 ante.

UPDATE

371 Issues still governed by English law

NOTE 5--The assessment, and therefore quantification, of damages is a question of procedure: *Harding v Wealands* [2006] UKHL 32, [2006] 4 All ER 1. See also *Maher v Groupama Grand Est* [2009] EWCA Civ 1191, [2010] 2 All ER 455.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/7. NON-CONTRACTUAL OBLIGATIONS/ (2) TORTS GOVERNED BY THE PRIVATE INTERNATIONAL LAW (MISCELLANEOUS PROVISIONS) ACT 1995/372. Maritime torts and torts in aircraft.

372. Maritime torts and torts in aircraft.

Part III of the Private International Law (Miscellaneous Provisions) Act 1995¹ has no effect on any rule of law (including rules of private international law) except those specifically abolished by the Act².

Accordingly, since the Act makes no express provision for torts committed at sea, whether in territorial waters or on the high seas, or for torts committed in aircraft³, the general choice of law rule of the Act⁴ will apply to these torts if they were previously governed by the double actionability rule at common law⁵. However, if certain torts committed on ships and in aircraft were governed not by the double actionability rule but by special rules of the conflict of laws, these special rules will continue to apply⁶.

1 Ie the Private International Law (Miscellaneous Provisions) Act 1995 Pt III (ss 9-15).

2 Ibid s 14(2). The 'double actionability' rule (and the exceptions to it), which governed the choice of law for torts committed abroad, was specifically abolished by the Private International Law (Miscellaneous Provisions) Act 1995: see para 368 ante.

3 There is no English authority on the law applicable to claims arising from aerial torts, but it is submitted that case law relating to ships may be applied by analogy. For a discussion of how the various problems that arise from aerial torts might be solved see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1541-1543.

4 As to the general rule see para 369 ante.

5 The 'double actionability' rule was thought to apply to claims made in an English court in respect of a wrong done on a ship (or on a structure such as an oil rig) in foreign territorial waters: *The Halley* (1868) LR 2 PC 193; *Carr v Francis Times & Co* [1902] AC 176, HL; *Mackinnon v Iberia Shipping Co Ltd* 1955 SC 20, [1954] 2 Lloyd's Rep 372. Such claims are now governed by the Private International Law (Miscellaneous Provisions) Act 1995 Pt III, with the applicable law being that of the country in whose territorial waters the tortious event took place. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

If the wrong occurred on board a ship on the high seas, the general rule still applied but with the law of the place of the tort being the law of the flag of the ship: see *R v Anderson* (1868) LR 1 CCR 161 at 168; *R v Carr* (1882) 10 QBD 76, CCR; *The Esso Malaysia* [1975] QB 198. As to the problem arising if a tort is alleged on the high seas between persons on ships of different countries see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1537.

In Australia, the legal and academic authorities on maritime torts were analysed in *Union Shipping v Morgan* [2002] NSWCA 124. Applying *Mackinnon v Iberia Shipping Co Ltd* supra, it was concluded that, in circumstances of 'substantial connection' with the littoral territory, where a maritime tort was committed on board a ship moored in a port of that territory and was connected to it by a continuous unloading operation, the law of the littoral territory governed the claim rather than the law of the flag.

6 Where torts on the high seas were alleged to arise from actions external to the ship (eg a collision involving another ship or object), the governing law was thought to be the general maritime law as administered in England as part of the common law of England: *Chartered Mercantile Bank of India, London and China v Netherlands India Steam Navigation Co Ltd* (1883) 10 QBD 521, CA; *The Leon* (1881) 6 PD 148; *The Waziristan* [1953] 2 All ER 1213; and see generally SHIPPING AND MARITIME LAW vol 93 (2008) PARA 86. This is so, even if they fly the same flag: *Chartered Mercantile Bank of India, London and China v Netherlands India Steam Navigation Co Ltd* supra. It seems that this rule will have remained unaffected by the coming into effect of the Private International Law (Miscellaneous Provisions) Act 1995 s 10 (see para 368 ante) and s 14(2) (see the text and note 2 supra). See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1538-1541. This proposition is supported by the comments of the Lord Chancellor in the Report of the Special Public Bill Committee (1 March 1995): *Private International Law (Miscellaneous Provisions) Bill [HL]: Proceedings of the Special Public Bill*

Committee (HL Paper (1994-95) no 36) Pt II col 27. However, this interpretation cannot clearly be derived from the words of the Private International Law (Miscellaneous Provisions) Act 1995.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/7. NON-CONTRACTUAL OBLIGATIONS/(3) TORTS NOT GOVERNED BY THE PRIVATE INTERNATIONAL LAW (MISCELLANEOUS PROVISIONS) ACT 1995/373. Torts not governed by the Act.

(3) TORTS NOT GOVERNED BY THE

373. Torts not governed by the Act.

Certain torts are not governed by the Private International Law (Miscellaneous Provisions) Act 1995¹, namely cases:

- 394 (1) where the tort was committed before the Act came in to effect²;
- 395 (2) where defamation is alleged³.

1 See para 367 ante.

2 See the Private International Law (Miscellaneous Provisions) Act 1995 s 14(1); and para 367 ante. See, in particular, para 367 note 3 ante.

3 See the Private International Law (Miscellaneous Provisions) Act 1995 s 13(1); and para 377 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/7. NON-CONTRACTUAL OBLIGATIONS/(3) TORTS NOT GOVERNED BY THE PRIVATE INTERNATIONAL LAW (MISCELLANEOUS PROVISIONS) ACT 1995/374. Choice of law for torts committed in England.

374. Choice of law for torts committed in England.

Where the Private International Law (Miscellaneous Provisions) Act 1995 does not apply¹, it is necessary first to determine whether the alleged tort occurred in England or overseas². If it is held to have occurred in England, all questions of liability arising out of it will be determined by English law alone, regardless of any other connections with a foreign country³. There is no possibility of making an exception to the application of English law, as such a case is not governed by the 'double actionability' rule⁴, which applies only to torts committed outside England⁵.

1 See paras 367, 373 ante.

2 As to the common law rules and authorities which determine the location of a tort see para 369 note 7 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 *Szalatnay-Stacho v Fink* [1947] KB 1, CA; *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 447, [1989] 3 All ER 14 at 32, CA.

4 See para 375 post.

5 *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, [1989] 3 All ER 14, CA.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/7. NON-CONTRACTUAL OBLIGATIONS/(3) TORTS NOT GOVERNED BY THE PRIVATE INTERNATIONAL LAW (MISCELLANEOUS PROVISIONS) ACT 1995/375. The general choice of law rule for torts committed abroad.

375. The general choice of law rule for torts committed abroad.

As a general rule, an act done abroad is actionable as a tort in England only if:

- 396 (1) it would have been actionable as a tort if it had been done in England; and
- 397 (2) it is actionable, though not necessarily as a tort, under the law of the foreign country¹.

This is known as the rule of 'double actionability'². If both conditions are satisfied, it appears that the court will adopt English law to dispose of the case³.

In order to satisfy the condition in head (1) above, the claimant must show that under the English domestic law of tort, he would have had a good cause of action in tort⁴. In particular, it must be established that he is able to sue⁵, that no substantive defence would preclude his recovering damages or obtaining other relief⁶, and that the defendant himself would be liable to the claimant⁷.

To satisfy the condition in head (2) above, the claimant must establish that civil liability exists between the parties for the particular head of damages claimed⁸. A purely procedural defence to liability under that law will be disregarded⁹, and it is not essential that the cause of action be classified under that law as lying in tort¹⁰. But if the only remedy available to the claimant in that country would be by way of criminal proceedings¹¹, or by claim from a statutory insurance fund in lieu of a civil claim¹², then the condition in head (2) above will not have been satisfied.

1 On the question of pleadings and proof of the *lex loci delicti* (as to which see para 369 ante) see *Kuwait Oil Tanker SAK v Al-Bader* [2000] 2 All ER (Comm) 271, CA (whether or not the claimant pleads that the matters relied upon are civilly actionable under the *lex loci delicti*, the burden in practice lies with the defendant to prove that his conduct is not so actionable). The court in *Kuwait Oil Tanker SAK v Al-Bader* supra cited Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1568 on the subject but declared the debate over pleadings and the burden of proof 'a somewhat arid one' and not susceptible to a general rule. For proof of foreign law see paras 28-29 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 The rule is based on the formula in *Phillips v Eyre* (1870) LR 6 QB 1 at 28-29, as modified by *Chaplin v Boys* [1971] AC 356, [1969] 2 All ER 1085, HL (see especially the restatement by Lord Wilberforce at 389 and 1102). The earlier diversity of judicial opinion has been resolved in favour of this formulation: see *Metall und Rohstoff v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 439-440, [1989] 3 All ER 14 at 27, CA; *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190, [1994] 3 All ER 749, PC.

For the view that the *lex fori* plays a dominant role see *Chaplin v Boys* supra at 398 and 1109 per Lord Pearson; *Coupland v Arabian Gulf Petroleum Co* [1983] 2 All ER 434, [1983] 1 WLR 1136 (affd [1983] 3 All ER 226, [1983] 1 WLR 1151, CA). However, this view probably cannot stand with *Red Sea Insurance Co Ltd v Bouygues SA* supra: if both the *lex fori* and law of the place of the tort are liable to be displaced in an appropriate case, neither can be seen as dominant over the other.

Note that the rule is flexible, and may be departed from in certain circumstances: see para 376 post.

3 See *Chaplin v Boys* [1971] AC 356 at 387-389, [1969] 2 All ER 1085 at 1100-1102, HL, per Lord Wilberforce; *Coupland v Arabian Gulf Petroleum Co* [1983] 2 All ER 434, [1983] 1 WLR 1136 (affd [1983] 3 All ER 226, [1983] 1 WLR 1151, CA).

4 *The Halley* (1868) LR 2 PC 193; *Chaplin v Boys* [1971] AC 356, [1969] 2 All ER 1085, HL; *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190, [1994] 3 All ER 749, PC.

It is insufficient to establish in English law the existence of a tort only approximately corresponding to the claim under the law of the place of the tort; the claimant must show that he could sue on the actual facts: *Def Lepp Music v Stuart-Brown* [1986] RPC 273 (action cannot be brought for alleged infringement of United Kingdom copyright by acts done outside the United Kingdom). Thus an action cannot be brought in England to complain of the alleged infringement of a foreign copyright by acts done outside the United Kingdom. This is either because the action would fail the first limb of the double actionability test and hence not be justiciable in an English court (see *Tyburn Productions Ltd v Conan Doyle* [1991] Ch 75, [1990] 1 All ER 909, where the use in film of the characters Sherlock Holmes and Dr Watson allegedly infringed copyright under United States law) or because it is undesirable for English courts to pronounce on 'local' matters (see *Coin Controls Ltd v Suza International (UK) Ltd* [1999] Ch 33). For a possible exception see para 376 note 3 post. For the meaning of 'United Kingdom' see para 4 ante.

Nor yet does it appear sufficient that there would be some civil liability according to English law but not in tort: this follows from the wording of the general rule, which has been repeatedly approved in this form.

5 This is particularly important where the claimant sues in a representative capacity, eg under the Fatal Accidents Act 1976 (see NEGLIGENCE vol 78 (2010) PARA 25 et seq) or the Law Reform (Miscellaneous Provisions) Act 1934 (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 814 et seq): see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1523-1525.

6 Eg a defence of justification or privilege in defamation, or the English rules on remoteness of damage or contributory negligence. As to contractual defences to claims in tort see para 378 post.

7 *The Halley* (1868) LR 2 PC 193; *Armagas Ltd v Mundogas SA* [1986] AC 717 at 740, 752, 769, [1985] 3 All ER 795 at 810, 819, 831-832, CA (affd on other grounds [1986] AC 717, [1986] 2 All ER 385, HL) (both cases on vicarious liability).

8 *Phillips v Eyre* (1870) LR 6 QB 1; *Chaplin v Boys* [1971] AC 356, [1969] 2 All ER 1085, HL; *Metall und Rohstoff v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, [1989] 3 All ER 14, CA; *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190, [1994] 3 All ER 749, PC. As to whether issues relating to damages are matters of substantive or procedural law see para 371 note 5 ante.

See also *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883, [2002] 3 All ER 209 (the double actionability rule was satisfied in a claim for conversion where the defendant appropriated property pursuant to a law which was held to be contrary to public policy and extra-territorial in its effect, being foreign legislation imposed on another state in breach of international law).

It is generally assumed that the reference to the law of the place where the tort took place (ie the *lex loci delicti*) indicates a reference to the domestic law of the court within whose jurisdiction the alleged tort occurred: see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1569. This is open to question, on the ground that if the place of the tort constitutes the natural forum for the litigation, the law to be applied would on that account be the substantive law which would be applied by that court, whether or not this would be its own domestic law. Renvoi (as to which see paras 6-10 ante) is excluded by the Private International Law (Miscellaneous Provisions) Act 1995 s 9(4) (see para 368 text and note 8 ante) from the torts to which that Act applies.

9 As to procedure see paras 11-27 ante.

10 This follows from the formulation of the rule in *Chaplin v Boys* [1971] AC 356 at 389, [1969] 2 All ER 1085 at 1102, HL, per Lord Wilberforce.

11 *Chaplin v Boys* [1971] AC 356, [1969] 2 All ER 1085, HL (see especially esp at 377, 381, 388 and 1091, 1095, 1101), overruling *Machado v Fontes* [1897] 2 QB 231, CA.

12 *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14 at 23.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/7. NON-CONTRACTUAL OBLIGATIONS/(3) TORTS NOT GOVERNED BY THE PRIVATE INTERNATIONAL LAW (MISCELLANEOUS PROVISIONS) ACT 1995/376. Exception to the general choice of law rule for torts committed abroad.

376. Exception to the general choice of law rule for torts committed abroad.

The 'double actionability' rule has been said to be flexible, and may be departed from in an appropriate case on clear and satisfactory grounds¹. If all, or virtually all, of the significant factors so indicate², a particular issue or even the entire question of liability may be governed instead by the law of the country which has the most significant relationship with the occurrence in question and with the parties³. Thus a claimant may recover even though the law of the place of the tort would have disallowed some or all of his claim⁴. Likewise, he may recover in respect of a tort actionable under the law of the place where it occurred even though the conduct would not have been actionable as a tort if it had occurred in England⁵.

For this exception to apply, the connection between the case and the country whose law is to be denied application must be so weak that the law has no interest in being applied to the particular dispute, and another law should be applied instead⁶.

1 *Chaplin v Boys* [1971] AC 356, [1969] 2 All ER 1085, HL (particular head of damages).

2 *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190, [1994] 3 All ER 749, PC.

3 *Chaplin v Boys* [1971] AC 356, [1969] 2 All ER 1085, HL; *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14; *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190, [1994] 3 All ER 749, PC.

The exception has been applied to allow an English court to entertain a claim in respect of alleged infringement of a foreign copyright by acts done outside the United Kingdom (which may be regarded otherwise as non-justiciable: see para 375 note 4 ante) where the foreign law is applied to determine liability for the acts done in the foreign jurisdiction, and the claim is in respect of a wrong which is not conceptually unknown to English law: see *Pearce v Ove Arup Partnership Ltd* [2000] Ch 403, [1999] 1 All ER 769, CA. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. For the meaning of 'United Kingdom' see para 4 ante.

4 *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14.

5 *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190, [1994] 3 All ER 749, PC.

6 *Chaplin v Boys* [1971] AC 356 at 392, [1969] 2 All ER 1085 at 1104, HL. The relevant factors include the nature of the tort, the particular issues presenting themselves, the question whether there is any special relationship between the parties, the policy underlying the rule of law in question, and the question of which system of law, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the issues: see *Chaplin v Boys* supra; the other cases cited in note 3 supra; and Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1562-1565.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/7. NON-CONTRACTUAL OBLIGATIONS/(3) TORTS NOT GOVERNED BY THE PRIVATE INTERNATIONAL LAW (MISCELLANEOUS PROVISIONS) ACT 1995/377. Choice of law in claims for defamation.

377. Choice of law in claims for defamation.

The Private International Law (Miscellaneous Provisions) Act 1995¹ has no application to the determination of issues arising in any defamation claim². Consequently, such claims fall to be governed by the common law choice of law rules.

Liability in respect of such claims, whenever arising, will therefore be governed by English domestic law if the alleged tort occurred in England³, or by the common law choice of law rules described previously⁴ if the alleged tort was committed overseas. The tort of defamation is committed where the words are heard and read rather than the place from where they are communicated⁵.

For the purpose of the exclusion of defamation claims from the operation of the Private International Law (Miscellaneous Provisions) Act 1995, 'defamation claim' means:

- 398 (1) any claim under the law of any part of the United Kingdom⁶ for libel or slander or for slander of title, slander of goods or other malicious falsehood⁷; and
- 399 (2) any claim under the law of any other country corresponding to or otherwise in the nature of a claim mentioned in head (1) above⁸.

1 The Private International Law (Miscellaneous Provisions) Act 1995 Pt III (ss 9-16).

2 Ibid ss 9(3), 13(1). As to defamation generally see LIBEL AND SLANDER.

3 *Szalatnay-Stacho v Fink* [1947] KB 1, CA (a defamation case which established the general principle). As to the rules of English domestic law see para 374 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. For the meaning of 'English domestic law' see para 2 note 3 ante.

4 See paras 375-376 ante. For a case where the 'double actionability' rule was satisfied in relation to a claim for defamation occurring outside England see *Church of Scientology of California v Metropolitan Police Comr* (1976) 120 Sol Jo 690, CA.

5 See *Bata v Bata* [1948] WN 366, CA; cf *Domicrest Ltd v Swiss Bank Corpn* [1999] QB 548, [1998] 3 All ER 577 (a case of negligent mis-statement under the Lugano Convention art 5 para 3).

As to jurisdiction disputes involving defamation claims see *Shevill v Presse Alliance SA* [1996] AC 959, [1996] 3 All ER 929, HL; *Berezovsky v Michaels* [2000] 2 All ER 986, [2000] 1 WLR 1004, HL; and para 91 note 8 ante.

6 For the meaning of 'United Kingdom' see para 4 ante.

7 Private International Law (Miscellaneous Provisions) Act 1995 s 13(2)(a). See generally LIBEL AND SLANDER. In Scotland this includes claims for verbal injury: s 13(2)(a).

8 Ibid s 13(2)(b). It is unclear to what extent this formulation encompasses other types of claim dealing with protection of reputation or self-esteem, more or less analogous to defamation, but which would not succeed under English law. Examples may be found in a defamation claim brought by an organ of government (*Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, [1993] 1 All ER 1011, HL) or a head of state, or a claim for compensation for causing embarrassment to such a claimant, or for breach of privacy in the acquisition of information, none of which give rise to an action in tort in English law. There is little guidance in *Private International Law: Choice of Law in Tort and Delict* (Law Com no 193) (1990), but see para 3.28. See also Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1561-1562.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/7. NON-CONTRACTUAL OBLIGATIONS/(4) INTERACTION BETWEEN CONTRACT AND TORT/378. The interaction between contract and tort.

(4)

378. The interaction between contract and tort.

At common law, a claimant who has sustained injury or suffered loss in circumstances which would entitle him to claim against a defendant for damages for tort or for breach of contract may proceed to bring an action on the contract if he so wishes, even though an action in tort would have failed under the rules¹.

It is less certain whether the reverse is true. As a matter of common law, the claimant may, if he wishes, frame his claim in tort rather than allege a breach of contract². If the defendant wishes to set up a contractual term as a defence to the claim in tort, it is uncertain which law governs his ability to do so³. An exemption clause valid by the law of the place of the tort but invalid by the *lex fori* has been held to defeat the claimant's claim⁴, but, in another case, the entire issue was treated as governed solely by the proper law of the contract⁵.

¹ See *Matthews v Kuwait Bechtel Corp* [1959] 2 QB 57, [1959] 2 All ER 345, CA. As to the choice of law rules for tort see paras 368-377 ante.

² See *Coupland v Arabian Gulf Oil Co* [1983] 2 All ER 434, [1983] 1 WLR 1136; affd [1983] 3 All ER 226, [1983] 1 WLR 1151, CA.

³ It is thought that, in principle, the question whether the term of the contract is intrinsically valid should be governed by the law which governs the contract; however, it is arguable whether the law governing the contract is determined by the *lex fori* or the by the law of the country selected as the applicable law in tort: see Cheshire and North *Private International Law* (13th Edn, 1999) pp 668-669.

⁴ *Canadian Pacific Rly Co v Parent* [1917] AC 195, PC (as there was accordingly no liability under the law of the place of the tort). Note that under the statutory rules introduced by the Private International Law (Miscellaneous Provisions) Act 1995 (see para 368 ante), actionability under the *lex fori* is not a requirement.

⁵ *Sayers v International Drilling Co NV* [1971] 3 All ER 163, [1971] 1 WLR 1176, CA. See also *Brodin v AR Seljan* 1973 SLT 198. For the meaning of 'the proper law (of a contract)' see para 349 note 7 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/7. NON-CONTRACTUAL OBLIGATIONS/(5) RESTITUTION/379. Restitutionary claims.

(5) RESTITUTION

379. Restitutionary claims.

The English conflict of law rules for the law of restitution are not well-defined¹.

However, with regard to what English law would classify as unjust enrichment, it has been suggested as a general principle that the obligation to restore the benefit of an enrichment which is obtained at the expense of another person is governed by the proper law of the obligation².

In such cases, the proper law of the obligation may be determined according to the following principle³:

- 400 (1) there is some authority for the proposition that claims for restitution arising in connection with a contract⁴ are governed by the law applicable to that contract (or by the law that would have applied if the contract had been valid)⁵;
- 401 (2) where head (1) above does not apply, restitutionary claims based on unjust enrichment are governed by the law of the country with which they have their closest and most real connection, so that:
- 23
- 31. (a) if the claim arises in relation to a transaction involving immovable property, the applicable law is the law of the country where the land is situated (the *lex situs*)⁶; and
- 32. (b) in other cases, the proper law is the law of the place where the enrichment occurred (or where the loss was suffered)⁷.
- 24

This general principle may be applied also where a restitutionary claim is founded on liability for wrongful receipt⁸ amounting to unjust enrichment⁹. However, where liability is based on the wrongful breach of an equitable obligation¹⁰, separate treatment is called for and the general principle does not apply¹¹.

It does not follow that a defendant who is subject to the jurisdiction of the English court is necessarily liable to the rules of English equity¹². However, as a matter of procedural law, he may have equitable remedies ordered over him in respect of rights and liabilities that arise from a fiduciary relationship under the law that is identified by the choice of law rules¹³. It is for the English court to decide whether the necessary fiduciary relationship exists so that, where the duties to which a relationship gives rise are determined by foreign law, the foreign law will determine the nature of those duties and the English court will decide whether duties of that nature are to be regarded as fiduciary¹⁴.

1 Difficulties attend because the substantive law of restitution is still developing and authorities that discuss the subject in the context of private international law are few in number. Furthermore, at least in English law, problems of characterisation may precede the choice of law. See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1487-1490, where the boundaries between restitutionary obligations and other obligations are discussed. See also *MacMillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 All ER 585, [1996] 1 WLR 387, CA, where it was stated that the rules of conflict of laws have to be directed at the particular issue of law which is in dispute rather than at the cause of action on which the claimant relies (although the decision in that case rested eventually on proprietary rather than restitutionary principles). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) Ch 34 Rule 200 at pp 1485-1493. See also *Arab Monetary Fund v Hashim* [1996] 1 Lloyd's Rep 589 at 591, CA. The law applicable to the obligation not only determines whether the obligation exists but also what the scope and content of the obligation is: Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1493.

3 Cf Cheshire and North *Private International Law* (13th Edn, 1999) pp 682-692.

4 If the contract is void, discharged or frustrated. Although a claim for restitution upon breach of contract is clearly covered by the Rome Convention art 10 para 1(c) (see para 365 ante), a claim for restitution consequent upon the nullity of a contract is not. Article 10 para 1(e), which uses the applicable law of the contract to determine the consequences of its nullity, does not have the force of law in the United Kingdom: Contracts (Applicable Law) Act 1990 s 2(2): see para 365 text and notes 9-10 ante. Article 10 para 1(e) of the Convention was not implemented because 'under English law the right to recover money paid under a void contract is part of the law of restitution and not the law of contract': 513 HL Official Report (5th series), 12 Dec 1989, col 1271 per Lord Fraser of Carmyllie. As to the Rome Convention see para 349 note 2 ante.

5 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, [1942] 2 All ER 122, HL; *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152, [1991] 4 All ER 871, HL. See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1493-1497; cf Cheshire and North *Private International Law* (13th Edn, 1999) pp 686-687.

6 *Batthyany v Walford* (1887) 36 ChD 269, CA. Cf Cheshire and North *Private International Law* (13th Edn, 1999) p 687.

7 See *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, [1979] 3 All ER 1025 (money paid under mistake of fact); *Re Jogia (a bankrupt)* [1988] 2 All ER 328, [1988] 1 WLR 484 (claim for money paid under a mistake and/or for money had and received); *Arab Monetary Fund v Hashim* [1996] 1 Lloyd's Rep 589, CA (wrongful acquisition of moveable property); *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 (revsd on other grounds [1994] 2 All ER 685, CA) (claim to trace the proceeds of fraud). This analysis has been accepted in *MacMillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 All ER 585 at 594-595, [1996] 1 WLR 387 at 397-398, CA (but without deciding that the analysis was correct). Cf Cheshire and North *Private International Law* (13th Edn, 1999) p 687. The rule as stated in text, which follows the formulation of Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) Ch 34 Rule 200(2)(c) at p 1485, was taken to be a rule of English private international law in *Kuwait Oil Tanker Co SAK v Al-Bader* [2000] 2 All ER (Comm) 271 at [190], CA.

Where there is divergence between the place of enrichment and the law with the closest connection to the claim see the discussion in Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1498-1501.

8 If unlawful or knowing receipt (see RESTITUTION vol 40(1) (2007 Reissue) para 147).

9 *Kuwait Oil Tanker SAK v Al-Bader* [2000] 2 All ER (Comm) 271, CA. See also *Grupo Torras SA v Al-Sabah* [2001] Lloyd's Rep Bank 36 at [140], [2001] CLC 221 at [140], CA.

10 If where a claimant makes a restitutionary claim in order to obtain a remedy for alleged wrongdoing.

11 *Grupo Torras SA v Al-Sabah* [2001] Lloyd's Rep Bank 36, [2001] CLC 221, CA (where both the restitutionary rule relating to receipt-based liability and the choice of law rule for tort were rejected and the claim based on dishonest assistance was decided instead according to the law of the place where the defendant performed the acts which gave rise to his alleged liability). As to the personal liability of trustees for a breach of trust see para 428 post.

12 See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1499-1501.

13 *Kuwait Oil Tanker SAK v Al-Bader* [2000] 2 All ER (Comm) 271, CA (restitutionary obligation under Kuwaiti law could be characterised as fiduciary in character by English law and was thus capable of supporting the equitable remedies in personam available to claimants in an English court). Cf *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 (revsd on other grounds [1994] 2 All ER 685, CA).

14 *Arab Monetary Fund v Hashim* (15 June 1994, unreported) per Chadwick J, approved in *Kuwait Oil Tanker SAK v Al-Bader* [2000] 2 All ER (Comm) 271, CA. If the duties are regarded as fiduciary according to these standards, the court then proceeds to ask whether it would be unconscionable for the defendant to retain the assets which are in dispute.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(1) CLASSIFICATION AND LOCATION/(i) Classification/380. Classification and terminology.

8. PROPERTY

(1) CLASSIFICATION AND LOCATION

(i) Classification

380. Classification and terminology.

For the purposes of the English rules of the conflict of laws, property is classified as movable or immovable¹. Whether property is movable or immovable is determined by the *lex situs*, the law of the place where the property is situated². These rules apply to tangible movables (*choses in possession*) as well as to intangible movables (*choses in action*)³.

1 See the cases cited in note 2 *infra*. This system of classification applies even in cases in which the domestic law of the foreign country concerned makes use of the English domestic classification of property as realty or personalty: see *Macdonald v Macdonald* 1932 SC (HL) 79 at 84; *Re Cutcliffe's Will Trusts, Brewer v Cutcliffe* [1940] Ch 565, [1940] 2 All ER 297. See, to the contrary effect, *Re Hoyles, Row v Jagg* [1911] 1 Ch 179 at 183, 185, CA. As to the meanings of 'England', 'English' and 'English law' see para 4 *ante*.

2 *Drummond v Drummond* (1799) 6 Bro Parl Cas 601, HL; *Johnstone v Baker* (1817) 4 Madd 474n; *Dowager Duchess of Buccleuch and Queensbury v Hoare* (1819) 4 Madd 467; *Elliott v Lord Minto* (1821) 6 Madd 16; *Trotter v Trotter* (1828) 4 Bli NS 502, HL; *Jerningham v Herbert* (1829) 4 Russ 388; *Allen v Anderson* (1846) 5 Hare 163; *Cust v Goring* (1854) 18 Beav 383 (all cases on Scottish heritable bonds); *Freke v Lord Carbery* (1873) LR 16 Eq 461; *Re Fitzgerald, Surman v Fitzgerald* [1904] 1 Ch 573, CA; *Re Hoyles, Row v Jagg* [1911] 1 Ch 179, CA; *Re Berchtold, Berchtold v Capron* [1923] 1 Ch 192; *Re Cutcliffe's Will Trusts, Brewer v Cutcliffe* [1940] Ch 565, [1940] 2 All ER 297. As to the location of property see paras 385-391 *post*. As to the *lex situs* as it relates to foreign immovables see para 399 *post*.

3 See eg *Re Hoyles, Row v Jagg* [1911] 1 Ch 179 at 183, CA (immovables according to English law situated abroad); *Re Anziani, Herbert v Christopherson* [1930] 1 Ch 407 at 424 (movables according to English law situated abroad). For a general analysis see *Haque v Haque (No 2)* (1965) 114 CLR 98 at 107, [1966] ALR 553 at 555, Aust HC (where, however, the use of the term 'intangible movables' for 'choses in action' is not accepted: 'physical mobility is not a quality of the conceptual').

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(1) CLASSIFICATION AND LOCATION/(i) Classification/381. Interests in land.

381. Interests in land.

All estates, interests and charges in or over English¹ land are classified as immovables². This applies to freehold³ and leasehold⁴ interests, to freehold land subject to a trust but remaining unsold⁵, to rentcharges⁶, mineral rights⁷ and to the interest of a mortgagee⁸. For this purpose the distinction between realty and personalty is wholly immaterial⁹.

1 Interests in land in a country outside England are classified by the law of that country: see para 380 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See *Re Hoyles, Row v Jagg* [1911] 1 Ch 179 at 183, 186, CA.

3 See eg *Freke v Lord Carbery* (1873) LR 16 Eq 461 at 466.

4 *Freke v Lord Carbery* (1873) LR 16 Eq 461 (a lease on a house in England, usually classified as personalty under English law, is immovable property for choice of law purposes); *Duncan v Lawson* (1889) 41 ChD 394; *Pepin v Bruyère* [1902] 1 Ch 24, CA. See also *Re Gentili's Goods* (1875) LR 9 Eq 541; *De Fogassieras v Duport* (1881) 11 LR 123.

5 *Re Berchtold, Berchtold v Capron* [1923] 1 Ch 192 (doctrine of conversion is not relevant to the classification of freehold property located in England for choice of law purposes, notwithstanding that the property is subject to a trust). See also *Murray v Champenowne* [1901] 2 IR 232 (the characterisation of property as immovable is not affected by it being subject to a trust).

6 *Chatfield v Berchtoldt* (1872) 7 Ch App 192. See also *Whitaker v Forbes* (1875) LR 10 CP 583; affd 1 CPD 51, CA (Australian land).

7 *Re Trepcia Mines Ltd* [1960] 3 All ER 304n, [1960] 1 WLR 1273, CA.

8 *Re Hoyles, Row v Jagg* [1911] 1 Ch 179, CA. Commonwealth courts, in cases concerning land within their jurisdictions, are divided as to whether the principle in this case is correct: see the authorities reviewed in *Haque v Haque (No 2)* (1965) 114 CLR 98, [1966] ALR 553, Aust HC (where it was held that the interest of an unpaid vendor of land could be equated with that of a mortgagee and was therefore, in the court's view, movable); and *Re Greenfield* [1985] 2 NZLR 662, NZ CA.

9 See eg *Re Berchtold, Berchtold v Capron* [1923] 1 Ch 192 at 200.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(1) CLASSIFICATION AND LOCATION/(i) Classification/382. Proceeds of sale of immovables.

382. Proceeds of sale of immovables.

The proceeds of sale of land will normally fall to be treated as movables. An interest in partnership land is immovable property, but a right to claim in the distribution of partnership assets, or to payment out of the assets of the value of a share in the partnership, is movable¹.

The above principle is subject to certain qualifications. The proceeds, situated in England², of sale of English settled land are, by virtue of statute³, immovable property for the purposes of disposition, transmission and devolution⁴. Also, the rights of persons interested in the proceeds of sale of immovable property are governed by the law of the country where the immovable is situated, even if the proceeds are removed from that country⁵.

1 *Haque v Haque* (No 2) (1965) 114 CLR 98 at 122, 130, [1966] ALR 553 at 565-566, 571, Aust HC. The treatment of the proceeds of the sale of partnership land as personalty for certain purposes (see eg *Forbes v Steven*, *Mackenzie v Forbes* (1870) LR 10 Eq 178; *Re Stokes*, *Stokes v Ducroz* (1890) 62 LT 176 (both cases concerning legacy duty)) is not relevant to the question whether these proceeds are movables or immovables: *Re Berchtold*, *Berchtold v Capron* [1923] 1 Ch 192 at 206; *Haque v Haque* (No 2) supra at 149 and 583-584.

2 See *Earl of Midleton v Baron Cottesloe* [1949] AC 418, [1949] 1 All ER 841, HL (effect of Settled Land Act 1882 as part of Irish law). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 Settled Land Act 1925 s 75(5) (replacing the Settled Land Act 1882 s 22(5)): see SETTLEMENTS vol 42 (Reissue) para 826.

4 *Re Cutcliffe's Will Trusts*, *Brewer v Cutcliffe* [1940] Ch 565, [1940] 2 All ER 297. However, they are not immovables for fiscal purposes: *Earl of Midleton v Baron Cottesloe* [1949] AC 418, [1949] 1 All ER 841, HL (death duty). See *Chatfield v Berchtoldt* (1872) 7 Ch App 192.

5 *Hanson v Walker* (1829) 7 LJOS Ch 135; *Waterhouse v Stansfield* (1851) 9 Hare 234; *Re Peat's Trusts* (1869) LR 7 Eq 302; *Grimwood v Bartels* (1877) 46 LJCh 788; *Murray v Champenowne* [1901] 2 IR 232; *Re Rea*, *Rea v Rea* [1902] 1 IR 451. Cf *Re Piercy*, *Whitwham v Piercy* [1895] 1 Ch 83; *Philipson-Stow v IRC* [1961] AC 727 at 744-745, [1960] 3 All ER 814 at 820, HL.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(1) CLASSIFICATION AND LOCATION/(i) Classification/383. Other property associated with land.

383. Other property associated with land.

The law of the place of the land in question will determine whether property associated with it, such as title deeds, fixtures or growing crops, is to be regarded as movable or immovable property¹. Growing crops on English² land, if *fructus industriales*³, may be treated as movables; crops which have been harvested, and so severed from the land, are movables⁴.

1 See para 380 ante.

2 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 I.e. the product of human labour, as opposed to *fructus naturales*.

4 The reported cases deal with similar, but distinct, questions: whether a contract was for the sale of goods for the purposes of the Statute of Frauds (1677) (eg *Evans v Roberts* (1826) 5 B & C 829) and the definition of personal chattels for the purposes of the Bills of Sale Acts (eg *Stephenson v Thompson* [1924] 2 KB 240, CA). See *Saunders (Inspector of Taxes) v Pilcher* [1949] 2 All ER 1097, CA; and AGRICULTURAL LAND vol 1 (2008) PARA 370; FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARAS 1662, 1670.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(1) CLASSIFICATION AND LOCATION/(i) Classification/384. Chattels.

384. Chattels.

Unless classified as immovable¹, all interests in chattels situated in England² are classified as movable property; this applies to intangible movables as well as to tangible movables³.

1 Eg 'chattels real', leasehold land (see para 381 ante), fixtures, etc (see para 383 ante).

2 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 See *Re Hoyles, Row v Jagg* [1911] 1 Ch 179 at 186, CA.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(1) CLASSIFICATION AND LOCATION/(ii) Location/385. Location of property in general.

(ii) Location

385. Location of property in general.

The location of property is a matter for English law¹. It is possible for property to be regarded as having different locations for different purposes. So far as corporeal property is concerned, the general rule is that the property is situated where it is to be found². Intangible movables are treated as having a situs³ in accordance with the principles stated in the following paragraphs.

1 See *Rossano v Manufacturers' Life Insurance Co* [1963] 2 QB 352 at 379-380, [1962] 2 All ER 214 at 230. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 As to ships on the high seas see para 391 post.

3 See *English, Scottish and Australian Bank Ltd v IRC* [1932] AC 238, HL; and CHOSER IN ACTION.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(1) CLASSIFICATION AND LOCATION/(ii) Location/386. Simple contract debts.

386. Simple contract debts.

A debt arising out of a simple contract is deemed to be situated in the place in which it is properly recoverable by action¹, that is, in general, the country in which the debtor is resident² or, in cases falling within the 'Brussels I' Regulation or the Brussels or Lugano Convention³, domiciled⁴. The debtor may be resident in a number of countries; in such a case the situs of the debt is the place where payment would be made in the normal course of commercial usage, for example, in the case of a debt due from a bank to a customer, at the branch where the account is kept⁵, in the case of a debt due under a policy of insurance, at the place where the policy money is made payable by the policy⁶, and similarly with a debt due under a sterling bill issued by a foreign government⁷. If the debtor is not resident in England⁸, the mere fact that the debt can be recovered by action in England from the debtor out of the jurisdiction does not make the debt locally situated in England⁹; nor does a stipulation for payment in England¹⁰.

1 Until a debt is payable and recoverable it has no situs: *Re Helbert Wagg & Co Ltd's Claim* [1956] Ch 323 at 339-340, [1956] 1 All ER 129 at 135. Cf *Kwok Chi Leung Karl v Comr of Estate Duty* [1988] 1 WLR 1035, PC (non-negotiable promissory note had a situs for estate duty purposes).

2 *Re Maudslay, Sons and Field, Maudslay v Maudslay, Sons and Field* [1900] 1 Ch 602; *Payne v R* [1902] AC 552, PC; *Swiss Bank Corp v Boehmische Industrial Bank* [1923] 1 KB 673 at 678, CA; *English, Scottish and Australian Bank Ltd v IRC* [1932] AC 238, HL; *Re Russian Bank for Foreign Trade* [1933] Ch 745; *Re Banque des Marchands de Moscou (Koupetschesky), Royal Exchange Assurance v Liquidator* [1952] 1 All ER 1269.

3 As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

4 See paras 83-88 ante.

5 *Martin v Nadel* [1906] 2 KB 26, CA; *R v Lovitt* [1912] AC 212 at 218-219, PC; *Clare & Co v Dresdner Bank* [1915] 2 KB 576; *Joachimson v Swiss Bank Corp* [1921] 3 KB 110, CA; *Swiss Bank Corp v Boehmische Industrial Bank* [1923] 1 KB 673, CA; *Richardson v Richardson* [1927] P 228; *Arab Bank Ltd v Barclays Bank (Dominion, Colonial and Overseas)* [1954] AC 495, [1954] 2 All ER 226, HL.

6 *New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101, CA; *Jabbour v Custodian of Israeli Absentee Property* [1954] 1 All ER 145, [1954] 1 WLR 139; *Rossano v Manufacturers' Life Insurance Co* [1963] 2 QB 352, [1962] 2 All ER 214.

7 *Re Russo-Asiatic Bank, Re Russian Bank for Foreign Trade* [1934] Ch 720.

8 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

9 *Re Banque des Marchands de Moscou (Koupetschesky)* [1954] 2 All ER 746, [1954] 1 WLR 1108, following *Deutsche Bank und Disconto Gesellschaft v Banque des Marchands de Moscou* (1938) 158 LT 364, CA.

10 *Re Helbert Wagg & Co Ltd's Claim* [1956] Ch 323, [1956] 1 All ER 129, following *Deutsche Bank und Disconto Gesellschaft v Banque des Marchands de Moscou* (1938) 158 LT 364, CA.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(1) CLASSIFICATION AND LOCATION/(ii) Location/387. Specialty debts.

387. Specialty debts.

A debt due on a specialty, which has a species of corporeal existence in the sealed instrument¹, is located where that instrument is situated². This rule has been applied to mortgage debts³ and to bonds issued by overseas governments under statutory authority⁴.

1 There is no longer a requirement that a deed be executed under seal: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1. For the proposition that deeds to which that Act applies are specialties whether or not they are executed under seal see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 929.

2 *Stamps Comr v Hope* [1891] AC 476, PC, approving *Gurney v Rawlins* (1836) 2 M & W 87; *Toronto General Trusts Corp v R* [1919] AC 679, PC; *Royal Trust Co v A-G for Alberta* [1930] AC 144, PC.

3 *Toronto General Trusts Corp v R* [1919] AC 679, PC.

4 *Royal Trust Co v A-G for Alberta* [1930] AC 144, PC. As to United Kingdom government stock see para 389 post.

UPDATE

387 Specialty debts

NOTE 1--1989 Act s 1 amended: Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(1) CLASSIFICATION AND LOCATION/(ii) Location/388. Securities transferable by delivery.

388. Securities transferable by delivery.

Negotiable instruments and all bonds and securities transferable by delivery¹ are located where the instrument or document is to be found².

¹ le not requiring transfer on a register. This includes negotiable shares: see *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 All ER 585, [1996] 1 WLR 387, CA. Cf para 389 post.

² *A-G v Bouwens* (1838) 4 M & W 171; *A-G v Glendining* (1904) 92 LT 87; *Winans v A-G (No 2)* [1910] AC 27, HL; *Re Clark, McKecknie v Clark* [1904] 1 Ch 294.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(1) CLASSIFICATION AND LOCATION/(ii) Location/389. Location where title dependent on registration.

389. Location where title dependent on registration.

Where title to an intangible movable, such as a share in a company or United Kingdom government stock, depends upon registration, the intangible movable is situated in the place at which the appropriate register is kept¹.

¹ *A-G v Higgins* (1857) 2 H & N 339; *New York Breweries Co Ltd v A-G* [1899] AC 62, HL; *IRC v Maple & Co (Paris) Ltd* [1908] AC 22, HL; *Brassard v Smith* [1925] AC 371, PC; *Baelz v Public Trustee* [1926] Ch 863; *London and South American Investment Trust Ltd v British Tobacco Co (Australia) Ltd* [1927] 1 Ch 107; *Erie Beach Co Ltd v A-G for Ontario* [1930] AC 161, PC; *R v Williams* [1942] AC 541, [1942] 2 All ER 95, PC. Letters of allotment of shares fall within the same principle: *Young v Phillips (Inspector of Taxes)* [1984] STC 520, 58 TC 232. See also *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 All ER 585, [1996] 1 WLR 387, CA (the title to the pieces of paper, which, as chattels, represent non-negotiable shares, is decided by the law of the place where they are situated, ie usually the place where the company is incorporated). As to the assignment of documents of title see para 409 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(1) CLASSIFICATION AND LOCATION/(ii) Location/390. Interests under a trust.

390. Interests under a trust.

Where the terms of a trust give a beneficiary a beneficial interest in property, the situs of the interest will be the same as that of the property¹. Where the trust creates merely a right of action against the trustees, it will be an intangible movable located where it can be enforced against the trustees, normally where they reside².

¹ *Re Berchtold, Berchtold v Capron* [1923] 1 Ch 192; *Philipson-Stow v IRC* [1961] AC 727 at 762, [1960] 3 All ER 814 at 831, HL. See also the analysis in *Haque v Haque (No 2)* (1965) 114 CLR 98 at 107, [1966] ALR 553 at 555, Aust HC.

² *Re Cigala's Settlement Trusts* (1878) 7 ChD 351; *Lord Sudeley v A-G* [1897] AC 11, HL; *Re Smyth, Leach v Leach* [1898] 1 Ch 89; *A-G v Johnson* [1907] 2 KB 885; *Favorke v Steinkopff* [1922] 1 Ch 174; *Stamp Duties (Queensland) Comr v Livingston* [1965] AC 694, [1964] 3 All ER 692, PC.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(1) CLASSIFICATION AND LOCATION/(ii) Location/391. Ships.

391. Ships.

A ship within the limits of territorial waters is treated as situated where it is actually located¹. It would seem that a ship on the high seas may be treated as situated at her port of registry².

1 *Trustees Executors and Agency Co Ltd v IRC* [1973] Ch 254, [1973] 1 All ER 563. As to the limits of territorial waters see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 123 et seq.

2 *Trustees Executors and Agency Co Ltd v IRC* [1973] Ch 254 at 263, [1973] 1 All ER 563 at 568. See also *Compania Naviera Vascongado v SS Cristina* [1938] AC 485 at 509, [1938] 1 All ER 719 at 733, HL; *The Jupiter* [1924] P 236 at 239, CA.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(2) JURISDICTION IN RELATION TO FOREIGN IMMOVABLES/(i) Jurisdiction under the 'Brussels I' Regulation and the Brussels and Lugano Conventions/392. Proceedings relating to tenancies of, or rights in rem in, immovable property.

(2) JURISDICTION IN RELATION TO FOREIGN IMMOVABLES

(i) Jurisdiction under the 'Brussels I' Regulation and the Brussels and Lugano Conventions

392. Proceedings relating to tenancies of, or rights in rem in, immovable property.

The English¹ court has jurisdiction in civil or commercial matters where the proceedings: (1) have as their object tenancies of, or rights in rem in, immovable property that is situated in England²; and (2) fall within the scope of the 'Brussels I' Regulation or the Brussels or Lugano Convention³. In such circumstances, jurisdiction is assumed regardless of domicile⁴.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See the 'Brussels I' Regulation art 22 para 1; the Brussels Convention art 16 para 1(a); the Lugano Convention art 16 para 1(a); and para 75 ante. This overrides the common law rules as to jurisdiction over foreign immovables: see *Pearce v Ove Arup Partnership Ltd* [2000] Ch 403, [1999] 1 All ER 769, CA; and para 394 post. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

A scheme which corresponds to that of the 'Brussels I' Regulation and the Brussels and Lugano Conventions allocates jurisdiction within the United Kingdom: see the Civil Jurisdiction and Judgments Act 1982 s 16 (as amended), Sch 4; and para 66 ante. As to the interpretation of the scheme by reference to decisions under the Conventions see para 70 ante. For the meaning of 'United Kingdom' see para 4 ante.

3 See Case C-8/98 *Dansommer A/S v Götz* [2000] ECR I-393, ECJ (the Brussels Convention art 16 para 1(a) applied to an action for damages brought by a professional tour operator, who had been subrogated to the rights of the property's owners, against defendants who had had leased a holiday home from them and had caused damage to it).

4 As to jurisdiction assumed over defendants located abroad where the whole subject matter of a claim relates to property situated within England see para 106 ante.

Where the 'Brussels I' Regulation or the Brussels or Lugano Convention do not apply, the English court applies traditional common law rules to proceedings: see paras 75 ante, 394 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(2) JURISDICTION IN RELATION TO FOREIGN IMMOVABLES/(ii) Jurisdiction under the Civil Jurisdiction and Judgments Act 1982/393. Proceedings for torts to immovable property.

(ii) Jurisdiction under the Civil Jurisdiction and Judgments Act 1982

393. Proceedings for torts to immovable property.

Subject to the 'Brussels I' Regulation and the Brussels and Lugano Conventions and the corresponding scheme for determining jurisdiction as between parts of the United Kingdom¹, and subject to certain exceptions², the jurisdiction of the English³ court to entertain proceedings for trespass⁴ to, or any other tort affecting, immovable property⁵ extends to cases in which the property in question is situated outside England, unless the proceedings are principally concerned with a question of the title to, or right to possession of, that property⁶.

1 Civil Jurisdiction and Judgments Act 1982 s 30(2) (amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 2 para 13; and the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 4, Sch 2 Pt IV para 13). See para 392 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. As to the corresponding scheme for determining jurisdiction as between parts of the United Kingdom see the Civil Jurisdiction and Judgments Act 1982 s 16 (as amended), Sch 4; and para 66 ante. For the meaning of 'United Kingdom' see para 4 ante.

2 See paras 395-398 post.

3 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 This includes proceedings in respect of conspiracy to commit a trespass: see *Hesperides Hotels Ltd v Muftizade* [1979] AC 508, [1978] 2 All ER 1168, HL.

5 This does not include chattels: *Hesperides Hotels Ltd v Muftizade* [1979] AC 508, [1978] 2 All ER 1168, HL (chattel contents of a hotel). However, the exclusion has been held to apply to rights arising under foreign intellectual property laws: *Tyburn Productions Ltd v Conan Doyle* [1991] Ch 75, [1990] 1 All ER 909. Cf *Pearce v Ove Arup Partnership Ltd* [2000] Ch 403, [1999] 1 All ER 769, CA. See also paras 76 ante, 394 post.

6 Civil Jurisdiction and Judgments Act 1982 s 30(1) (amended by the Civil Jurisdiction and Judgments Act 1991 Sch 2 para 13). This qualifies the rule as to recovery of damages for trespass to foreign land given in *British South Africa Co v Companhia de Moçambique* [1893] AC 602, HL (which barred such recovery even though no question of title arises in such actions).

It would seem that jurisdiction cannot be created by agreement between the parties: see *The Tolten* [1946] P 135 at 166, [1946] 2 All ER 372 at 388, CA. Cf *The Mary Moxham* (1876) 1 PD 107 at 109, CA; *Re Duke of Wellington, Glentanar v Wellington* [1948] Ch 118, CA. See also *Razelos v Razelos* [1969] 3 All ER 929 at 935, sub nom *Razelos v Razelos (No 2)* [1970] 1 WLR 392 at 403; for further proceedings see [1970] 1 All ER 386n, [1970] 1 WLR 390.

Proceedings are 'principally concerned' with title or the right to possession only if they are 'for the most part' or 'chiefly' concerned with such questions; an action raising other substantial questions, such as whether a trespass had been committed and whether the applicant was responsible for it, which are merely incidental to questions of title or the right to possession, comes within the court's jurisdiction: *Re Polly Peck International plc (in administration) (No 4)* [1997] 2 BCLC 630; revsd on other grounds sub nom *Re Polly Peck International plc (in administration) (No 2)* [1998] 3 All ER 812, [1998] 2 BCLC 185, CA (the approach taken at first instance was approved and declared to be consistent with that taken in recent patent cases: see *Coin Controls Ltd v Suza International (UK) Ltd* [1999] Ch 33, [1997] 3 All ER 45; *Fort Dodge Animal Health Ltd v Akzo Nobel NV* [1998] FSR 222, CA).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(2) JURISDICTION IN RELATION TO FOREIGN IMMOVABLES/(iii) Jurisdiction Excluded at Common Law/394. Exclusion of jurisdiction at common law.

(iii) Jurisdiction Excluded at Common Law

394. Exclusion of jurisdiction at common law.

At common law, it remains the case that an English¹ court cannot entertain any action for a declaration as to title to foreign immovables², or for possession of such immovables³, or for injunctions having a similar effect⁴. The same rule applies to other proceedings the primary question in which is one of title to foreign immovables, such as an action for an account of the proceeds of foreign land, title to which is in dispute⁵, for the enforcement of covenants for quiet enjoyment of foreign land⁶, or for the partition of such land⁷.

Where the proceedings are not principally concerned⁸ with questions of title to, or possession of, immovable property, the usual rules as to jurisdiction in personam apply⁹.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Companhia de Moçambique v British South Africa Co* [1892] 2 QB 358, DC (claims for declaration and injunction abandoned on appeal at 385, CA; for the text of the injunction sought see 66 LT 775); *Inglis v Commonwealth Trading Bank of Australia* (1972) 20 FLR 30.

3 *Roberdeau v Rous* (1738) 1 Atk 543.

4 See para 393 note 6 ante.

5 *Re Hawthorne, Graham v Massey* (1883) 23 ChD 743.

6 See *Black Point Syndicate Ltd v Eastern Concession Ltd* (1898) 79 LT 658 (where the existence of jurisdiction was doubted).

7 *Cartwright v Pettus* (1675) 2 Cas in Ch 214. Cf to the contrary *Tulloch v Hartley* (1841) 1 Y & C Ch Cas 114, *sed quaere*.

8 This means that jurisdiction is not barred where questions of title arise as a collateral incident of the trial of other issues: *St Pierre v South American Stores (Gath and Chaves) Ltd* [1936] 1 KB 382, CA. See also para 393 note 6 ante.

9 As to the rules relating to jurisdiction in personam see paras 396-398 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(2) JURISDICTION IN RELATION TO FOREIGN IMMOVABLES/(iv) Jurisdiction assumed under Exceptions to the Common Law Rules/395. Damage to foreign immovables by ship.

(iv) Jurisdiction assumed under Exceptions to the Common Law Rules

395. Damage to foreign immovables by ship.

An English court has jurisdiction to enforce a maritime lien based on damage by a ship to foreign immovables by an admiralty action in rem against the ship¹.

¹ *The Tolten* [1946] P 135, [1946] 2 All ER 372, CA. See SHIPPING AND MARITIME LAW vol 93 (2008) PARA 110. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(2) JURISDICTION IN RELATION TO FOREIGN IMMOVABLES/(iv) Jurisdiction assumed under Exceptions to the Common Law Rules/396. Equitable jurisdiction in personam.

396. Equitable jurisdiction in personam.

While the jurisdiction to deal with foreign immovables is generally denied to an English¹ court where the issue is characterised as relating to a right in rem², equity can assist where a personal obligation relating to a foreign immovable is held to affect a person's conscience. Where the English court has general jurisdiction over a person and there exists between the parties a personal obligation or equity which does not depend for its existence on the lex situs of the immovable property³ but arises out of contract, or trust, or from fraud or other unconscionable conduct, the court may exercise jurisdiction in personam⁴.

This principle does not give jurisdiction to determine title to foreign immovables where there is no personal obligation between the parties⁵, or only some equity which depends for its existence on the lex situs of the immovable⁶.

Under this principle, the English court may exercise jurisdiction in the following ways:

- 402 (1) in an action on a contract relating to foreign immovables⁷, it may order specific performance⁸ of any such contract⁹ which the lex situs of the immovables in question allows to be carried into effect¹⁰;
- 403 (2) it may enforce a trust relating to foreign immovables¹¹, and it also has jurisdiction to decide whether or not a valid trust exists¹²;
- 404 (3) it may grant relief in cases of fraud or inequitable dealing with regard to foreign immovables¹³, and this includes the power to set aside, or otherwise relieve against, a conveyance of foreign immovables procured by fraud¹⁴;
- 405 (4) where a legal or equitable mortgage of foreign immovables has been validly made according to English law¹⁵, it may make orders for foreclosure¹⁶ or for redemption¹⁷, and it may compel the mortgagor to pay off the mortgage debt out of the proceeds of the sale of the land¹⁸;
- 406 (5) it may order an account of the rents and profits of a foreign immovable against any person liable to account in respect of them¹⁹, and in a suitable case a receiver may be appointed²⁰.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See para 392 ante. As to the exception see para 393 ante.

3 As to whether the right in question has to be recognised also by the lex situs see para 398 post. As to the lex situs generally see para 380 ante. As to the lex situs as it relates to foreign immovables see para 399 post.

4 *Archer v Preston* (prior to 1682) 1 Eq Cas Abr 133, pl 3, cited in *Arglasse v Muschamp* (1682) 1 Vern 76; *Foster v Vassall* (1747) 3 Atk 587; *Penn v Lord Baltimore* (1750) 1 Ves Sen 444; *Lord Cranstown v Johnston* (1796) 3 Ves 170; *Lord Portarlington v Soulby* (1834) 3 My & K 104 at 108; *Ewing v Orr Ewing* (1883) 9 App Cas 34, HL; *British South Africa Co v Companhia de Moçambique* [1893] AC 602 at 626-627, HL; *Deschamps v Miller* [1908] 1 Ch 856; *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424, [1969] 1 All ER 289 (affd [1969] 2 Ch 424 at 433, [1969] 1 All ER 943, CA); *Razelos v Razelos* [1969] 3 All ER 929, sub nom *Razelos v Razelos (No 2)* [1970] 1 WLR 392 (for further proceedings see [1970] 1 All ER 386n, [1970] 1 WLR 390); *Cook Industries Inc v Galliher* [1979] Ch 439, [1978] 3 All ER 945; *Chellaram v Chellaram* [1985] Ch 409, [1985] 1 All ER 1043; and see generally the cases cited in notes 7-20 infra. Cf *Companhia de Moçambique v British South Africa Co* [1892] 2 QB 358 at 404-405, CA.

5 *Re Hawthorne, Graham v Massey* (1883) 23 ChD 743; *Companhia de Moçambique v British South Africa Co* [1892] 2 QB 358 at 364, 366, DC; *Deschamps v Miller* [1908] 1 Ch 856. Cf Case C-294/92 *Webb v Webb* [1994]

QB 696, [1994] 3 All ER 911, [1994] ECR I-1717, ECJ (applied in *Ashurst v Pollard* [2001] Ch 595, [2001] 2 All ER 75, CA). See also para 75 ante.

6 *Deschamps v Miller* [1908] 1 Ch 856 at 863. For further restrictions on this jurisdiction see para 398 post.

7 *St Pierre v South American Stores (Gath and Chaves) Ltd* [1936] 1 KB 382, CA (rent); *Buenos Ayres and Ensenada Port Rly Co v Northern Rly Co of Buenos Ayres* (1877) 2 QBD 210 (rent and share of cost of works on foreign land). Cf Case C-294/92 *Webb v Webb* [1994] QB 696, [1994] 3 All ER 911, [1994] ECR I-1717, ECJ.

8 For the principles upon which the court will act in granting equitable remedies see para 398 post.

9 *Penn v Lord Baltimore* (1750) 1 Ves Sen 444; *Jackson v Petrie* (1804) 10 Ves 164; *Re Courtney, ex p Pollard* (1840) Mont & Ch 239 at 250-252; *Cood v Cood* (1863) 33 Beav 314; *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424, [1969] 1 All ER 289 (affd [1969] 2 Ch 424 at 433, [1969] 1 All ER 943, CA). See also *White v Hall* (1806) 12 Ves 321; *Lord Portarlington v Soulby* (1834) 3 My & K 104 at 108; *Ewing v Orr Ewing* (1883) 9 App Cas 34 at 40, HL; *British South Africa Co v Companhia de Moçambique* [1893] AC 602 at 626, HL; *Duder v Amsterdamsch Trustees Kantoor* [1902] 2 Ch 132.

10 See para 398 post.

11 *Earl of Kildare v Eustace* (1686) 1 Vern 419; *Clarke v Earl of Ormonde* (1821) Jac 108 at 125; *Harrison v Gurney* (1821) 2 Jac & W 563; *Jenney v Mackintosh* (1886) 33 ChD 595; *Re Clinton, Clinton v Clinton* (1903) 88 LT 17. See also *Ewing v Orr Ewing* (1883) 9 App Cas 34 at 40, HL; *British South Africa Co v Companhia de Moçambique* [1893] AC 602 at 626, HL.

12 *Re Clinton, Clinton v Clinton* (1903) 88 LT 17; *Chellaram v Chellaram* [1985] Ch 409, [1985] 1 All ER 1043. As to the recognition of trusts see paras 424-430 post. The English court has power to make vesting orders relating to property in any part of Her Majesty's dominions except Scotland: Trustee Act 1925 s 56. For the procedure in respect of applications under that Act where land or investments are situated in Scotland see *Practice Note* (1945) 61 TLR 319. As to Her Majesty's dominions see COMMONWEALTH vol 13 (2009) PARA 707.

Where the English court has jurisdiction to administer a trust or the estate of a deceased person (see para 441 post) and the property includes both movable or immovable property in England and immovable property abroad, the court has jurisdiction to determine questions of title to the foreign immovables for the purposes of the administration: *Bunbury v Bunbury* (1839) 1 Beav 318; *Earl Nelson v Lord Bridport* (1845) 8 Beav 547; *Hope v Carnegie* (1866) 1 Ch App 320; *Ewing v Orr Ewing* (1883) 9 App Cas 34, HL; *Re Piercy, Whitwham v Piercy* [1895] 1 Ch 83; *Re Moses, Moses v Valentine* [1908] 2 Ch 235; *Re Stirling, Stirling v Stirling* [1908] 2 Ch 344; *Re Pearse's Settlement, Pearse v Pearse* [1909] 1 Ch 304; *Re Hoyles, Row v Jagg* [1911] 1 Ch 179, CA; *Re Ross, Ross v Waterfield* [1930] 1 Ch 377; *Re Duke of Wellington, Glentanar v Wellington* [1948] Ch 118, [1947] 2 All ER 854 at 864, CA. See also *British South Africa Co v Companhia de Moçambique* [1893] AC 602 at 626, HL.

13 *Arglasse v Muschamp* (1682) 1 Vern 76; *Angus v Angus* (1737) West temp Hard 23; *Lord Cranstown v Johnston* (1796) 3 Ves 170; *White v Hall* (1806) 12 Ves 321; *Jones v Geddes* (1845) 1 Ph 724; *Lord Portarlington v Soulby* (1834) 3 My & K 104 at 108; *British South Africa Co v Companhia de Moçambique* [1893] AC 602 at 626, HL; *Razelos v Razelos* [1969] 3 All ER 929, sub nom *Razelos v Razelos (No 2)* [1970] 1 WLR 392 (for further proceedings see [1970] 1 All ER 386n, [1970] 1 WLR 390); *Cook Industries Inc v Galliher* [1979] Ch 439, [1978] 3 All ER 945.

14 *Arglasse v Muschamp* (1682) 1 Vern 76; *Angus v Angus* (1737) West temp Hard 23. For the principles upon which the court grants relief see para 398 post. A creditor who under his own execution purchases foreign land belonging to his debtor will be compelled by the court to hold it as security for the debt and therefore subject to a right of redemption: *Lord Cranstown v Johnston* (1796) 3 Ves 170. It is otherwise if the local court ordered a judicial sale: see *White v Hall* (1806) 12 Ves 321; and para 398 post.

15 As to legal and equitable mortgages see MORTGAGE vol 77 (2010) PARAS 104, 105, 117 et seq.

16 *Toller v Carteret* (1705) 2 Vern 494; *Earl of Derby v Duke of Atholl* (1749) 1 Ves Sen 202 at 204; *Lord Portarlington v Soulby* (1834) 3 My & K 104 at 108; *Norris v Chambres* (1861) 29 Beav 246 at 255 (affd (1861) 3 De GF & J 583); *Paget v Ede* (1874) LR 18 Eq 118; *Re Hawthorne, Graham v Massey* (1883) 23 ChD 743 at 747-748. See also *Bawtree v Great North-West Central Rly Co* (1898) 14 TLR 448, CA. For the position where the local law does not permit foreclosure cf para 398 text to note 5 post. The court cannot order the sale of foreign land: *Grey v Manitoba and North Western Rly Co of Canada* [1897] AC 254, PC.

17 *Beckford v Kemble* (1822) 1 Sim & St 7.

18 *Earl of Derby v Duke of Atholl* (1749) 1 Ves Sen 202 at 204; *Re Courtney, ex p Pollard* (1840) Mont & Ch 239. See also *Norton v Florence Land and Public Works Co* (1877) 7 ChD 332; *Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co* [1892] 2 Ch 303; *Re Anchor Line (Henderson Bros) Ltd* [1937] Ch 483, [1937] 2 All ER 823 (effect on property in Scotland of what is now the Insolvency Act 1986 s 185

(see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 883)). For the position where local law would not recognise the claimant's rights see para 398 text to note 5 post.

Where an order for redemption has been made in England an injunction will be granted against a mortgagee who brings a foreclosure action in the local courts, and vice versa: *Beckford v Kemble* (1822) 1 Sim & St 7. See also para 398 text to note 6 post.

The English court will decree the specific performance of a contract governed by English law to grant a mortgage of foreign land, and the contract will be interpreted as requiring a mortgage which contains such equities and rights of redemption as are usually found in an English mortgage: *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch 502, CA (revsd on other grounds sub nom *De Beers Consolidated Mines Ltd v British South Africa Co* [1912] AC 52, HL); *Re Smith, Lawrence v Kitson* [1916] 2 Ch 206 (order made against deceased debtor's personal representatives).

For the principles on which the court will act see para 398 post.

19 *Cartwright v Pettus* (1675) 2 Cas in Ch 214 (see sub nom *Carteret v Petty* (1676) 2 Swan 323n); *Scott v Nesbitt* (1808) 14 Ves 438; *Beattie v Johnstone* (1848) 8 Hare 169 at 177; *Hendrick v Wood* (1861) 30 LJCh 583; *Paget v Ede* (1874) LR 18 Eq 118 at 126.

20 *Harrison v Gurney* (1821) 2 Jac & W 563; *Clarke v Earl of Ormonde* (1821) Jac 108 at 116, 121; *Houlditch v Marquess of Donegall* (1834) 2 Cl & Fin 470, HL; *Paget v Ede* (1874) LR 18 Eq 118 at 126; *Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co* [1892] 2 Ch 303; *Re Maudslay, Sons and Field, Maudslay v Maudslay, Sons and Field* [1900] 1 Ch 602 at 611; *Duder v Amsterdamsch Trustees Kantoor* [1902] 2 Ch 132. For the principles on which the court exercises its jurisdiction see para 398 post. See also COMPANIES vol 15 (2009) PARA 1366.

The English court cannot put the receiver in possession of foreign immovables, but any party to the action in which the order is made who prevents the necessary steps being taken to enable the receiver to take possession according to the lex situs is guilty of contempt of court: *Re Maudslay, Sons and Field, Maudslay v Maudslay, Sons and Field* [1900] 1 Ch 602 at 611. It is not contempt for any other person to take proceedings in the local court for possession before the receiver can take proceedings: *Re Maudslay, Sons and Field, Maudslay v Maudslay, Sons and Field* supra. As to contempt of court generally see CONTEMPT OF COURT.

UPDATE

396 Equitable jurisdiction in personam

NOTES 1-6--*Deschamps*, cited, considered in *R Griggs Group Ltd v Evans* [2004] EWHC 1088 (Ch), [2005] Ch 153.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(2) JURISDICTION IN RELATION TO FOREIGN IMMOVABLES/(iv) Jurisdiction assumed under Exceptions to the Common Law Rules/397. Jurisdiction in respect of third persons.

397. Jurisdiction in respect of third persons.

The English¹ court will not grant relief in order to enforce English principles of equity against third persons who have acquired a good title by the *lex situs* of the immovables², or, in the absence of privity between the parties, to impose on a foreign immovable a burden other than that which the local law requires it to bear³.

Thus where the claim is not recognised by the *lex situs* this principle will defeat a claim by legatees to marshal against the heir of foreign land⁴, by an unpaid vendor of foreign land to enforce a lien against the land in the hands of a subsequent purchaser⁵, or by a beneficiary under a marriage settlement to enforce a claim against the land in the hands of a mortgagee⁶. Similarly, a purchaser under a contract for the sale of foreign land has no power to claim relief against a person who subsequently gained a good title by the *lex situs*, even where that person took with notice of the contract⁷.

The English court will exercise its equitable jurisdiction against third parties who are affected by equities under the *lex situs* of the immovables itself. Thus where an English company takes a foreign immovable under an express obligation to satisfy another's equitable claim out of it, the court can exercise jurisdiction and enforce the claim by restraining the company and its directors from applying the proceeds of the foreign land without making proper provision for satisfying the claim⁸.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Martin v Martin* (1831) 2 Russ & M 507; *Waterhouse v Stansfield* (1851) 9 Hare 234 (subsequent proceedings (1852) 10 Hare 254); *Norris v Chambres* (1861) 29 Beav 246 (affd (1861) 3 De GF & J 583); *Hicks v Powell* (1869) 4 Ch App 741. As to the *lex situs* generally see para 380 ante. As to the *lex situs* as it relates to foreign immovables see para 399 post.

3 *Harrison v Harrison* (1873) 8 Ch App 342; *Re Hewit, Lawson v Duncan* [1891] 3 Ch 568; and see para 398 note 3 post.

4 *Harrison v Harrison* (1873) 8 Ch App 342.

5 *Norris v Chambres* (1861) 29 Beav 246; affd (1861) 3 De GF & J 583.

6 *Martin v Martin* (1831) 2 Russ & M 507. Cf *Deschamps v Miller* [1908] 1 Ch 856.

7 *Norton v Florence Land and Public Works Co* (1877) 7 ChD 332.

8 *Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co* [1892] 2 Ch 303.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(2) JURISDICTION IN RELATION TO FOREIGN IMMOVABLES/(iv) Jurisdiction assumed under Exceptions to the Common Law Rules/398. Exercise of equitable jurisdiction.

398. Exercise of equitable jurisdiction.

Equitable remedies are in the discretion of the court, and an English¹ court will act upon its own principles in deciding whether to grant relief. Accordingly, the effect of laches or acquiescence as a bar to specific performance is a matter for English law².

It is uncertain to what extent the English court will grant relief to a party so as to enforce rights which would not be recognised by the *lex situs* of the immovables³. The English court will not act so as to prevent a person from enjoying what a judgment of the local court has declared him to be entitled to⁴; nor will it act where to do so would be useless, and where it would be impossible for the decree to be carried into effect⁵. Jurisdiction will not be exercised (and a fortiori the taking or continuance of proceedings in foreign courts will not be restrained by injunction⁶) where, on the whole, the question can be more conveniently decided in the local courts than in England⁷.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Cood v Cood* (1863) 33 Beav 314. As to acquiescence and laches as defences in English law to claims for specific performance see SPECIFIC PERFORMANCE vol 44(1) (Reissue) para 902 et seq.

3 See *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424, [1969] 1 All ER 289; affd [1969] 2 Ch 424 at 433, [1969] 1 All ER 943, CA. For the view that English law will prevail see *Re Courtney, ex p Pollard* (1840) Mont & Ch 239 (especially at 251 but cf at 250); *Coote v Jecks* (1872) LR 13 Eq 597; *Re Scheibler, ex p Holthausen* (1874) 9 Ch App 722; *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 1 Ch 354 at 387; *Re Anchor Line (Henderson Bros) Ltd* [1937] Ch 483, [1937] 2 All ER 823. For the contrary view see *Bent v Young* (1838) 9 Sim 180; *Waterhouse v Stansfield* (1852) 10 Hare 254; *Norris v Chambres* (1861) 29 Beav 246 at 255 (affd (1861) 3 De GF & J 583); *Hicks v Powell* (1869) 4 Ch App 741. As to the *lex situs* generally see para 380 ante. As to the *lex situs* as it relates to foreign immovables see para 399 post.

4 *White v Hall* (1806) 12 Ves 321.

5 *Mercantile Investment and General Trust Co v River Plate Trust, Loan and Agency Co* [1892] 2 Ch 303; *Grey v Manitoba and North Western Ry Co of Canada* [1897] AC 254, PC; *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424, [1969] 1 All ER 289 (affd [1969] 2 Ch 424 at 433, [1969] 1 All ER 943, CA).

6 As to restraining actions in foreign courts concerning immovables see *Beckford v Kemble* (1822) 1 Sim & St 7; *Booth v Leycester* (1837) 1 Keen 579; *Bunbury v Bunbury* (1839) 1 Beav 318 (affd (1839) 8 LJCh 297 at 302); *Jones v Geddes* (1845) 1 Ph 724; *Hope v Carnegie* (1866) 1 Ch App 320; *Hearn v Glanville* (1883) 48 LT 356. See generally paras 130-134 ante.

7 See *Cookney v Anderson* (1863) 1 De GJ & Sm 365; *Blake v Blake* (1870) 18 WR 944; *Matthaei v Galitzin* (1874) LR 18 Eq 340; *Doss v Secretary of State for India in Council* (1875) LR 19 Eq 509 (all as explained in *Companhia de Moçambique v British South Africa Co* [1892] 2 QB 358 at 367, DC). See also *Norton v Florence Land and Public Works Co* (1877) 7 ChD 332 (where proceedings had been commenced abroad). For special cases as to proceedings against the Crown see *Re Holmes* (1861) 2 John & H 527; *Doss v Secretary of State for India in Council* supra; and CROWN PROCEEDINGS AND CROWN PRACTICE vol 12(1) (Reissue) para 112.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(3) CHOICE OF LAW IN RELATION TO IMMOVABLES/399. In general.

(3) CHOICE OF LAW IN RELATION TO IMMOVABLES

399. In general.

As a general rule¹, all questions concerning rights over immovables are governed by the lex situs². This principle is based upon considerations of convenience and expediency. Any other rule might be ineffective, because in the last resort land can only be dealt with in a manner which the lex situs allows.

The general rule applies not only to immovables situated in England but also to immovables situated abroad, so far as the English court has jurisdiction to deal with them³. In the latter case, there is general agreement among text book writers⁴, and some support from decided cases⁵, that the lex situs means, not the domestic law of the situs, but whatever system of domestic law the courts of the situs would apply. In other words, there is a strong case for applying the doctrine of total renvoi⁶ to cases concerning title to foreign immovables, for the application of the domestic law of the situs might be ineffective if the courts of the situs would apply some other law.

1 For exceptions see paras 420, 451, 453, 461-462 post.

2 See the cases cited in paras 400-402, 443, 448, 456 post. As to the lex situs generally see para 380 ante.

3 See paras 396-398 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 See eg Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 958; Cheshire and North *Private International Law* (13th Edn, 1999) pp 62, 930.

5 *Re Ross, Ross v Waterfield* [1930] 1 Ch 377; *Re Duke of Wellington, Glentanar v Wellington* [1947] Ch 506, [1947] 2 All ER 854 (affd [1948] Ch 118, [1947] 2 All ER 854 at 864, CA).

6 As to the doctrine of renvoi see paras 6-10 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(3) CHOICE OF LAW IN RELATION TO IMMOVABLES/400. Capacity.

400. Capacity.

All questions of capacity to assign¹ or acquire an immovable are governed by the lex situs of the immovable².

1 As to assignment by will see para 449 post.

2 *Bank of Africa Ltd v Cohen* [1909] 2 Ch 129, CA. This has been criticised in Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 960 and Cheshire and North *Private International Law* (13th Edn, 1999) p 932. As to the lex situs generally see para 380 ante. As to the lex situs as it relates to foreign immovables see para 399 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(3) CHOICE OF LAW IN RELATION TO IMMOVABLES/401. Formalities.

401. Formalities.

An assignment of an immovable must comply in point of form with the *lex situs* of the immovable¹, and accordingly a conveyance of English land must comply with the formalities prescribed by English law². An assignment which does not satisfy the formal requirements of the *lex situs* may give rise to an equity recognised by and enforceable in the English court³.

The formal validity of a contract relating to immovables is subject to the rules of the Rome Convention⁴. However, a contract the subject matter of which is a right in immovable property or a right to use immovable property is subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract⁵.

A rule of the *lex situs* declaring a valid assignment or contract relating to immovables inadmissible in evidence will be ignored in England, procedural questions being governed by the *lex fori*⁶.

1 *Waterhouse v Stansfield* (1852) 10 Hare 254; *Adams v Clutterbuck* (1883) 10 QBD 403 (document executed in England purporting to convey shooting rights to Scottish land not formally valid under English law but valid under Scottish law, which was applied). As to the formal validity of wills of immovables see paras 450-451 post. As to the *lex situs* generally see para 380 ante. As to the *lex situs* as it relates to foreign immovables see para 399 post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Re Hernando, Hernando v Sawtell* (1884) 27 ChD 284 at 293, 296. Cf *Coppin v Coppin* (1725) 2 P Wms 291 (a case relating to wills, decided before the Wills Act 1837).

3 As to the jurisdiction to enforce such equities and the principles upon which it is exercised see paras 396-398 ante.

4 See the Rome Convention art 9; and para 363 ante. See also, at common law, *Re Smith, Lawrence v Kitson* [1916] 2 Ch 206 (deed executed in England by a testator charging land situated in the West Indies as security for a debt did not constitute a valid incumbrance on the land under the *lex situs*). As to the Rome Convention see para 349 note 2 ante.

5 Rome Convention art 9 para 6. This probably only applies in the rare circumstances where the *lex situs* of the immovable property applies the mandatory rules as to form even when the contract has been entered into in a foreign country and is governed by a foreign law: see the Official Report on the Rome Convention prepared by Professor Mario Giuliano and Professor Paul Lagarde (OJ C282, 31.10.80, p 1) p 32. See also para 363 ante.

6 *Hicks v Powell* (1869) 4 Ch App 741 at 746. See paras 15-16 ante; and cf para 17 ante. As to the *lex fori* see para 11 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(3) CHOICE OF LAW IN RELATION TO IMMOVABLES/402. Material or essential validity.

402. Material or essential validity.

The material or essential validity of an assignment of immovable property is governed by the lex situs of the immovable¹. This principle applies to such matters as the nature and incidents of the estates created in the immovable² and restraints on alienation³. In the case of immovables subject to a trust, the construction, effects and administration of the trust are governed by the applicable law as determined under the Convention on the Law applicable to Trusts and on their Recognition⁴; this includes restrictions upon the duration of the trust, and upon the power to accumulate the income of the trust⁵.

1 See the cases cited in notes 2-3 *infra*; and para 456 *post* (wills of immovables). As to the lex situs generally see para 380 *ante*. As to the lex situs as it relates to foreign immovables see para 399 *ante*.

2 See *Earl Nelson v Lord Bridport* (1845) 8 Beav 547; *Re Miller, Bailie v Miller* [1914] 1 Ch 511.

3 *Waterhouse v Stansfield* (1852) 10 Hare 254 at 259.

4 I.e the Convention on the law applicable to trusts and on their recognition, which was adopted in draft form by the Hague Conference on Private International Law on 20 October 1984 (Cmnd 9494) and signed by the United Kingdom on 10 January 1986: see the Recognition of Trusts Act 1987 s 1(1), Schedule art 8; and para 424 *et seq post*.

5 *Ibid* Schedule art 8(f).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(3) CHOICE OF LAW IN RELATION TO IMMOVABLES/403. Sums charged upon immovables.

403. Sums charged upon immovables.

Where a sum of money is charged upon an immovable, the question as to which currency provides the unit of account by reference to which the amount of the debt is to be measured¹ is one of construction². Prima facie the money of account will be the currency of the country in which the immovables are situated, but in every case the intention of the parties is the governing consideration³.

The same principle applies to the rate of interest payable. The rate will be that fixed by the lex situs of the immovable⁴, unless a contrary intention appears⁵. Where the sum is charged partly upon land in England and partly upon land elsewhere, the English rate may apply⁶.

1 As to money of account and money of payment and the effect of changing rates of exchange see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1299-1302. See also DAMAGES vol 12(1) (Reissue) para 1132.

2 *Phipps v Earl of Anglesea* (1721) 1 P Wms 696 (marriage settlement and will); *Lansdowne v Lansdowne* (1820) 2 Bli 60, HL (settlement); *Cope v Cope* (1846) 15 Sim 118 (marriage settlement); *Macrae v Goodman* (1846) 5 Moo PCC 315 (mortgage). For other cases on wills see para 455 post.

3 *Lansdowne v Lansdowne* (1820) 2 Bli 60 at 88, HL; *Northern Bank Ltd v Edwards* [1985] IR 284.

4 *Balfour v Cooper* (1883) 23 ChD 472, CA. See to the contrary *Stapleton v Conway* (1750) 1 Ves Sen 427. As to the lex situs generally see para 380 ante. As to the lex situs as it relates to foreign immovables see para 399 ante.

5 *Phipps v Earl of Anglesea* (1721) 1 P Wms 696, although the rate was there fixed by consent. See also the cases on wills cited in para 455 note 8 post.

6 *Young v Lord Waterpark* (1842) 13 Sim 199 (as explained in *Balfour v Cooper* (1883) 23 ChD 472, CA). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(3) CHOICE OF LAW IN RELATION TO IMMOVABLES/404. Lapse of time.

404. Lapse of time.

The effect of lapse of time upon the existence or enforcement of any right in respect of immovables is governed by the *lex situs* of the immovables¹. Accordingly where by the *lex situs* a person's title to immovables is extinguished, the English² court will look upon it as extinguished³. A similar principle applies where an action for the recovery of land is statute-barred by the *lex situs*⁴. Where the English court has jurisdiction to pronounce upon or enforce rights in respect of foreign immovables⁵, it will only hold a right barred by lapse of time if it is so barred by the *lex situs*⁶.

1 Cf the rule as to limitation of actions in other contexts: see para 26 ante. As to the *lex situs* generally see para 380 ante. As to the *lex situs* as it relates to foreign immovables see para 399 ante.

2 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 *Beckford v Wade* (1805) 17 Ves 87, PC (prescriptive title after possession for a stated period).

4 See the Foreign Limitation Periods Act 1984 s 1; and para 26 ante. Cf *Re Peat's Trusts* (1869) LR 7 Eq 302 (English action for proceeds of foreign land barred by foreign statute of limitations barred in England).

5 For the circumstances in which such jurisdiction exists see paras 392-398 ante.

6 *Pitt v Lord Dacre* (1876) 3 ChD 295 (land in Jamaica; English statute of limitations inapplicable). Cf *Colonial Investment and Loan Co v Martin* [1928] SCR 440, [1928] 3 DLR 784, Can SC; and Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 961. If the action in England is for an equitable remedy (eg specific performance) the defence of laches may be available: see para 398 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(4) CHOICE OF LAW IN RELATION TO MOVABLES/(i) Tangible Movable/405. Assignments of tangible movables.

(4) CHOICE OF LAW IN RELATION TO MOVABLES

(i) Tangible Movable

405. Assignments of tangible movable.

The validity and effect of an assignment¹ of a tangible movable² are governed by the *lex situs*³. Accordingly, the proprietary effect of an assignment will be recognised in England as giving a good title if, and only if, it has that effect in the *lex situs*⁴; an assignee regarded by the *lex situs* as bound by prior rights will be similarly bound in the view of the English court⁵. It is immaterial that the former owner of the movable, whose title is defeated by an assignment taking place abroad, never consented to the property being in the relevant foreign country, or was the victim of a theft⁶. If the property is in England, the validity and effect of the assignment will be governed by English law⁷, but not all rules of English domestic law are applicable to assignments taking place abroad⁸.

1 As to assignment on marriage see paras 412-421 post; as to succession see paras 443-464 post; and as to bankruptcy see paras 501, 503 post. As to the assignment of documents of title see para 409 post. As to the recognition of foreign judgments in rem see paras 162-164 ante.

2 As to the assignment of intangible movables see para 411 post.

3 Where the assignment has been effected by contract, the validity, interpretation and consequences of breach are governed by the law applicable to that contract. As to the *lex situs* generally see para 380 ante. As to the *lex situs* as it relates to foreign immovables see para 399 ante. As to the location of property see paras 385-391 ante. As to the effect of a change of situs see para 406 post.

4 *Inglis v Usherwood* (1801) 1 East 515; *Cammell v Sewell* (1860) 5 H & N 728; *Castrique v Imrie* (1870) LR 4 HL 414 at 429; *City Bank v Barrow* (1880) 5 App Cas 664, HL; *Alcock v Smith* [1892] 1 Ch 238 at 268, CA; *Inglis v Robertson* [1898] AC 616, HL; *Embiricos v Anglo-Austrian Bank* [1905] 1 KB 677 at 683, CA; *Re Korvine's Trust*, *Levashoff v Block* [1921] 1 Ch 343 at 348; *Re Anziani*, *Herbert v Christopherson* [1930] 1 Ch 407; *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248 at 257, [1951] 2 All ER 779 at 786; *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496, [1980] 1 All ER 1121; *Gotha City v Sotheby's (No 2)* (1998) Times, 8 October; *Glencore International AG v Metro Trading Inc* [2001] 1 Lloyd's Rep 284. See also *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 All ER 585 at 597, [1996] 1 WLR 387 at 400, CA, per Staughton LJ.

The principle in the text is illustrated by the recognition in England of sales ordered or confirmed by the courts of the situs: *Cammell v Sewell* supra; *Minna Craig SS Co v Chartered Mercantile Bank of India, London and China* [1897] 1 QB 460, CA.

As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

5 See *Hooper v Gumm*, *McLellan v Gumm* (1867) 2 Ch App 282. As to pledges see para 407 post.

6 *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496, [1980] 1 All ER 1121.

7 *Re Korvine's Trust*, *Levashoff v Block* [1921] 1 Ch 343 (donatio mortis causa). Cf *Re Craven's Estate*, *Lloyds Bank v Cockburn* [1937] Ch 423, [1937] 3 All ER 33 (same question treated as one of administration of estates).

8 *Dulaney v Merry & Sons* [1901] 1 KB 536; *Re Pilkington's Will Trusts*, *Pilkington v Harrison* [1937] Ch 574, [1937] 3 All ER 213 (registration under the Deeds of Arrangement Act 1914). See also Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 966; Cheshire and North *Private International Law* (13th Edn, 1999) pp 948-950.

UPDATE

405 Assignments of tangible movables

NOTE 4--*Macmillan Inc*, cited, applied in *Islamic Republic of Iran v Berend*[2007] EWHC 132 (QB), [2007] 2 All ER (Comm) 132.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(4) CHOICE OF LAW IN RELATION TO MOVABLES/(i) Tangible Movable/406. Change of location.

406. Change of location.

A change in the location of a tangible movable does not itself affect title to the property¹. Thus an English² court determines the validity or effect of an assignment which took place before the change of location according to the *lex situs* which applied at the time of the assignment³. Nevertheless, the validity and effect of any assignment that is made subsequent to the change of location will be governed, under the principle already stated⁴, by the new *lex situs*; in appropriate cases, a good title acquired under the old *lex situs* may be defeated⁵.

1 *Cammell v Sewell* (1860) 5 H & N 728 at 742-743; *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496, [1980] 1 All ER 1121.

2 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 Eg if property is removed after a valid title has passed (under the *lex situs* then applying to the property) to a country under whose law (as the current *lex situs*) title did not pass, the title is held to be good. See *Simpson v Fogo* (1863) 1 Hem & M 195; *Hooper v Gumm*, *McLellan v Gumm* (1867) 2 Ch App 282; *Industrial Acceptance Corp Ltd v LaFlamme* [1950] OR 311, [1950] 2 DLR 822; *Century Credit Corp v Richard* [1962] OR 815, 34 DLR (2d) 291, Ont CA. See also Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 969-975. As to the *lex situs* generally see para 380 ante.

4 See para 405 ante.

5 Eg rules of the new *lex situs* as to sales in market overt, sales by mercantile agents and judicial sales: see *Cammell v Sewell* (1860) 5 H & N 728 at 744; *Alcock v Smith* [1892] 1 Ch 238 at 267, CA; *Embiricos v Anglo-Austrian Bank* [1905] 1 KB 677, CA; *Mehta v Sutton* (1913) 108 LT 214 (affd (1913) 109 LT 529, CA); *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496, [1980] 1 All ER 1121. Note that the doctrine of market overt has been abolished in English law: see MARKETS, FAIRS AND STREET TRADING vol 29(2) (Reissue) para 1026.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(4) CHOICE OF LAW IN RELATION TO MOVABLES/(i) Tangible Movables/407. Pledges.

407. Pledges.

The validity and effect of a pledge are governed by the *lex situs* of the property pledged¹. The relative rights of pledgor and pledgee are governed by the proper law of their transaction, which will determine, for example, whether the pledgee may redeliver the goods to the pledgor in certain circumstances without losing his security².

1 *City Bank v Barrow* (1880) 5 App Cas 664, HL; *Inglis v Robertson* [1898] AC 616, HL; cf *North Western Bank Ltd v Poynter, Son and Macdonalds* [1895] AC 56, HL. As to the *lex situs* generally see para 380 ante.

2 *North Western Bank Ltd v Poynter, Son and Macdonalds* [1895] AC 56, HL. See also *Inglis v Robertson* [1898] AC 616 at 626-627, HL. For the effect of later transactions see *North Western Bank Ltd v Poynter, Son and Macdonalds* supra at 67. For the meaning of 'the proper law (of a contract)' see para 349 note 7 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(4) CHOICE OF LAW IN RELATION TO MOVABLES/(i) Tangible Movable/408. Stoppage in transit.

408. Stoppage in transit.

The lex situs of the property determines the existence of a right of stoppage in transit and the manner of its exercise¹.

¹ *Inglis v Usherwood* (1801) 1 East 515. See CARRIAGE AND CARRIERS vol 7 (2008) PARA 766 et seq; SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) para 259 et seq. As to the lex situs generally see para 380 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(4) CHOICE OF LAW IN RELATION TO MOVABLES/(i) Tangible Movable/409. Assignment of negotiable instruments and documents of title.

409. Assignment of negotiable instruments and documents of title.

Negotiable instruments and documents of title to movables, such as bills of lading, are regarded as corporeal movables, the assignment of which is governed by rules different from those affecting intangible movables¹.

The validity and effect of an assignment of a negotiable instrument or document of title are governed by the law of the country in which the assignment takes place². This will be the *lex situs* of the instrument or document, and the rule stated above accords with the general principle governing assignments of movables³.

1 As to the assignment of intangible movables see para 411 post. The Rome Convention does not apply to obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character: see art 1 para 2(c); and para 350 text and note 9 ante. As to the Rome Convention see para 349 note 2 ante.

2 *Alcock v Smith* [1892] 1 Ch 238 at 255, CA; *Inglis v Robertson* [1898] AC 616, HL; *Embiricos v Anglo-Austrian Bank* [1905] 1 KB 677, CA. Cf *North Western Bank Ltd v Poynter, Son and Macdonalds* [1895] AC 56, HL, as explained in *Inglis v Robertson* supra at 626-627. As to bills of exchange and the effect of the Bills of Exchange Act 1882 s 72 (as amended) see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1590-1594. See also Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1446-1448.

3 See para 405 ante. As to the *lex situs* generally see para 380 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(4) CHOICE OF LAW IN RELATION TO MOVABLES/(ii) Intangible Movables/410. Location of intangible movables.

(ii) Intangible Movables

410. Location of intangible movables.

The general rule is that an intangible is located where it is properly recoverable or where it can be enforced.

Thus an obligation to pay a sum of money is governed by the law of the place where the debtor resides¹. Where the debtor has more than one place of residence, the debt is located in the place stipulated, either explicitly or implicitly, by the creditor in the contract; or, failing such a stipulation, where the debt would be paid in the normal course of business².

¹ *Life Insurance Co v Public Trustee New York* [1924] 2 Ch 101; *Kwok Chi Leung Karl v Estate Duty Comrs* [1988] 1 WLR 1035.

² See *Jabbour v Custodian of Absentee's Property of State of Israel* [1954] 1 All ER 145 at 152, [1954] 1 WLR 139 at 146. See also *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607, [1981] 1 WLR 1233 (debt arising from irrevocable letter of credit is located in the place where it is payable against the documents rather than the place of residence of the bank).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(4) CHOICE OF LAW IN RELATION TO MOVABLES/(ii) Intangible Movable/411. Assignment of intangible movables.

411. Assignment of intangible movables.

The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ('the debtor') are governed by the law which applies to the contract between the assignor and assignee¹.

The law governing the right to which the assignment relates also determines its assignability², the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged³.

Where proprietary (rather than contractual) matters are concerned, the *lex situs* appears to govern, being the law of the place where the right was created⁴.

1 Rome Convention art 12 para 1. If there is no contract, it must be presumed that the Convention does not apply. There is weak authority for suggesting that the *lex situs* may govern the assignments of debts at common law: see *Re Maudslay* [1900] 1 Ch 602. Cf *Le Fevre v Sullivan* (1855) 10 Moo PCC 1; *Kelly v Selwyn* [1905] 2 Ch 117. As to the *lex situs* generally see para 380 ante. As to the Rome Convention see para 349 note 2 ante.

2 Cf *Campbell Connelly & Co Ltd v Noble* [1963] 1 All ER 237 at 239, [1963] 1 WLR 252 at 255 (see note 4 infra); *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101 at 128-129, [1964] 1 All ER 216 at 235; *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 3 All ER 747, [1995] 1 WLR 978 (on appeal [1996] 1 All ER 585, [1996] 1 WLR 387, CA).

3 Rome Convention art 12 para 2. See *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC, The Mount I* [2001] EWCA Civ 68, [2001] QB 825, [2001] 3 All ER 257, where the benefit of an insurance policy is assigned, the whole of the relationship between assignor and assignee is a contractual issue falling within the Rome Convention art 12 and therefore the law which governs the contract of assignment governs the relationship, including whether or not the assignee can recover from the assignor.

4 Eg where intellectual property rights such as patents, trade marks or copyright are assigned: *Campbell Connelly & Co Ltd v Noble* [1963] 1 All ER 237, [1963] 1 WLR 252 (assignability of copyright to be determined by the law governing the creation of the copyright). See also *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 3 All ER 747, [1995] 1 WLR 978, where it was held that the priorities of competing assignments are determined by the law of the place where the transactions on which the defendants relied took place (affd on other grounds [1996] 1 All ER 585, [1996] 1 WLR 387, CA).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(5) ASSIGNMENT OF PROPERTY ON MARRIAGE/(i) Where there is no Marriage Contract or Settlement/412. Effect of marriage on movables.

(5) ASSIGNMENT OF PROPERTY ON MARRIAGE

(i) Where there is no Marriage Contract or Settlement

412. Effect of marriage on movables.

In the absence of any marriage contract or settlement and in the absence of any subsequent change of domicile, the rights of a husband and wife to each other's movables, whether possessed at the date of the marriage or acquired afterwards, are governed by the law of the parties' matrimonial domicile¹. In the absence of special circumstances², this is presumed to be the husband's domicile at the date of the marriage³.

1 *Sawer v Shute* (1792) 1 Anst 63; *Royal Bank of Scotland v Cuthbert* (1812) 1 Rose 462 at 481 (as explained in *Selkirk v Davies* (1814) 2 Dow 230, HL); *M'Cormick v Garnett* (1854) 5 De GM & G 278; *Welch v Tennent* [1891] AC 639 at 644-645, HL; *Re Martin, Loustalan v Loustalan* [1900] P 211 at 233, CA; *Re Egerton's Will Trusts, Lloyds Bank Ltd v Egerton* [1956] Ch 593, [1956] 2 All ER 817.

2 Certain circumstances might lead the court to infer that the parties intend their proprietary rights to be regulated by another law, eg where parties without means agree before marrying to emigrate to another country immediately after the marriage and do so: *Re Egerton's Will Trusts, Lloyds Bank Ltd v Egerton* [1956] Ch 593 at 604-605, [1956] 2 All ER 817 at 824.

3 See the cases cited in note 1 supra. See also Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1066-1071, where it is suggested that the formulation of this rule is outmoded and can be supported only where both parties are domiciled in the same country.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(5) ASSIGNMENT OF PROPERTY ON MARRIAGE/(i) Where there is no Marriage Contract or Settlement/413. Change of domicile after marriage.

413. Change of domicile after marriage.

The effect of a change of domicile after the date of the marriage on the rights of the parties to a marriage to each other's movables is unclear. Some authority suggests that the law of the new domicile governs all the rights of the parties to each other's movables¹, except in so far as proprietary rights have already vested in either spouse². Other authority adopts a doctrine of immutability, whereby the property regime under which the parties were married applies notwithstanding a change in domicile³.

1 *Lashley v Hog* (1804) 2 Coop temp Cott 449, HL, as explained and distinguished in *De Nicols v Curlier* [1900] AC 21 at 34, 36-37, 44, HL, although *Lashley v Hog* supra can be explained as turning on the law of succession. Cf *Re Mengel's Will Trusts, Westminster Bank Ltd v Mengel* [1962] Ch 791, [1962] 2 All ER 490 (where, however, the point was not argued).

2 Cf *De Nicols v Curlier* [1900] AC 21, HL.

3 *De Nicols v Curlier* [1900] AC 21, HL, in which case, however, there was an implied contract. See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1079-1085.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(5) ASSIGNMENT OF PROPERTY ON MARRIAGE/(i) Where there is no Marriage Contract or Settlement/414. Effect of marriage on immovables.

414. Effect of marriage on immovables.

In the absence of any marriage contract or settlement, the rights of husband and wife to each other's immovables are governed by the *lex situs*¹.

¹ *Welch v Tennynt* [1891] AC 639, HL; *Callwood v Callwood* [1960] AC 659 at 683, [1960] 2 All ER 1 at 10, PC; *Tezcan v Tezcan* (1992) 87 DLR (4th) 503, 38 RFL (3d) 142, BC CA. See also paras 399-404 ante. As to the *lex situs* generally see para 380 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(5) ASSIGNMENT OF PROPERTY ON MARRIAGE/(i) Where there is no Marriage Contract or Settlement/415. Married Women's Property Act 1882.

415. Married Women's Property Act 1882.

The jurisdiction of the English¹ court summarily to determine disputes between husband and wife as to the title to or possession of property² extends to movables and immovables situated abroad as well as in England³, and the court may make an order under that jurisdiction even though the spouses are domiciled abroad and subject to a system of community of property⁴.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 Ie under the Married Women's Property Act 1882 s 17 (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 224 et seq.

3 *Razelos v Razelos* [1969] 3 All ER 929, sub nom *Razelos v Razelos (No 2)* [1970] 1 WLR 392 (where at 936 and 403 the court assumed that its order relating to the foreign immovables would be recognised and enforced by the lex situs); for further proceedings see [1970] 1 All ER 386n, [1970] 1 WLR 390. As to the lex situs generally see para 380 ante.

4 *Re Bettinson's Question* [1956] Ch 67, [1955] 3 All ER 296.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(5) ASSIGNMENT OF PROPERTY ON MARRIAGE/(ii) Where there is a Marriage Contract or Settlement/416. Contracts relating to movables.

(ii) Where there is a Marriage Contract or Settlement

416. Contracts relating to movables.

Where there is a marriage contract or settlement, the rights of the husband and wife to all movables within its terms, whether possessed at the date of the marriage or acquired afterwards, are governed by the proper law of the contract or settlement¹, even if the settlement is implied by law², and even if there is a change of domicile after the marriage³.

1 *Feaubert v Turst* (1703) Prec Ch 207, 1 Bro Parl Cas 129, HL; *Anstruther v Adair* (1834) 2 My & K 513; *Este v Smyth* (1854) 18 Beav 112; *Duncan v Cannan* (1854) 18 Beav 128; *Watts v Shrimpton* (1855) 21 Beav 97; *Van Grutten v Digby* (1862) 31 Beav 561; *Chamberlain v Napier* (1880) 15 ChD 614; *Re Fitzgerald, Surman v Fitzgerald* [1904] 1 Ch 573, CA; *Duke of Marlborough v A-G* [1945] Ch 78, [1945] 1 All ER 165, CA. The proper law thus governs the material or essential validity of the settlement and its interpretation and effect: see the cases cited supra, and the cases cited in the notes to para 417 post. For the meaning of 'the proper law (of a contract)' see para 349 note 7 ante. The common law rules apply because contractual rights as to 'rights in property arising out of a matrimonial relationship' are not within the scope of the Rome Convention, as given effect in England by the Contracts (Applicable Law) Act 1990: see the Rome Convention 1 art 1(2)(b); and para 350 ante. As to the Rome Convention see para 349 note 2 ante.

2 *De Nicols v Curlier* [1900] AC 21, HL.

3 *De Nicols v Curlier* [1900] AC 21, HL; *Feaubert v Turst* (1703) Prec Ch 207, 1 Bro Parl Cas 129, HL; *Duncan v Cannan* (1854) 18 Beav 128. As to change in the terms of a contract after a change in domicile see *Duyvewaardt v Barber* (1992) 43 RFL (3d) 139, BC CA.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(5) ASSIGNMENT OF PROPERTY ON MARRIAGE/(ii) Where there is a Marriage Contract or Settlement/417. The proper law of a marriage contract or settlement.

417. The proper law of a marriage contract or settlement.

The most important factor in determining the proper law of a marriage contract or settlement relating to movables is the law of the matrimonial domicile¹, but this may be displaced by any sufficient indication² of an intention to contract with reference to some other law³. Such an intention may be apparent from an express stipulation in the settlement that another law is to apply⁴. Otherwise, it may be gathered from a consideration of the contract as a whole, taking into account circumstances such as the legal form of the settlement⁵, the invalidity of certain provisions under the law of the matrimonial domicile⁶, the character and situation of the property⁷, the domicile and residence of the trustees of the settlement⁸, the source of provision of property for the settlement⁹, and the circumstances in which the settlement came to be made¹⁰. For the purpose of determining the proper law of the settlement, the contract must be considered as at the date of the settlement¹¹.

1 *De Nicols v Curlier* [1900] AC 21, HL; *Re Muspratt-Williams, Muspratt-Williams v Howe* (1901) 84 LT 191 at 192; *Re Bankes, Reynolds v Ellis* [1902] 2 Ch 333 at 343; *Re Fitzgerald, Surman v Fitzgerald* [1904] 1 Ch 573 at 587, 594, CA; *Re Hewitt's Settlement, Hewitt v Hewitt* [1915] 1 Ch 228 at 232; *Duke of Marlborough v A-G* [1945] Ch 78, [1945] 1 All ER 165, CA. As to the matrimonial domicile see para 412 ante. For the meaning of 'the proper law (of a contract)' generally see para 349 note 7 ante.

2 For this purpose, all such evidence of the circumstances as is generally admissible for the purpose of construing a written contract is admissible to ascertain its proper law, and direct evidence of intention supplied after the date of the settlement is inadmissible: *Duke of Marlborough v A-G* [1945] Ch 78 at 88-89, [1945] 1 All ER 165 at 171, CA.

3 *Chamberlain v Napier* (1880) 15 ChD 614; *Re Barnard, Barnard v White* (1887) 56 LT 9; *Re Bankes, Reynolds v Ellis* [1902] 2 Ch 333; *Re Fitzgerald, Surman v Fitzgerald* [1904] 1 Ch 573, CA; *Re Mackenzie, Mackenzie v Edwards-Moss* [1911] 1 Ch 578 at 596; *Re Hewitt's Settlement, Hewitt v Hewitt* [1915] 1 Ch 228 at 232-233.

4 *Este v Smyth* (1854) 18 Beav 112 at 122; *Van Grutten v Digby* (1862) 31 Beav 561 at 568; *Re Fitzgerald, Surman v Fitzgerald* [1904] 1 Ch 573 at 587, CA; *Montgomery v Zarifi* (1918) 88 LJPC 20, HL. Cf *Guépratte v Young* (1851) 4 De G & Sm 217; *Byam v Byam* (1854) 19 Beav 58; *Re Muspratt-Williams, Muspratt-Williams v Howe* (1901) 84 LT 191.

5 *Watts v Shrimpton* (1855) 21 Beav 97; *Re Barnard, Barnard v White* (1887) 56 LT 9; *Re Mégret, Tweedie v Maunder* [1901] 1 Ch 547; *Re Bankes, Reynolds v Ellis* [1902] 2 Ch 333; *Re Fitzgerald, Surman v Fitzgerald* [1904] 1 Ch 573, CA; *Re Mackenzie, Mackenzie v Edwards-Moss* [1911] 1 Ch 578; *Re Hewitt's Settlement, Hewitt v Hewitt* [1915] 1 Ch 228; *Duke of Marlborough v A-G* [1945] Ch 78, [1945] 1 All ER 165, CA; *Sawrey-Cookson v Sawrey-Cookson's Trustees* (1905) 8 F 157, Ct of Sess.

6 *Re Bankes, Reynolds v Ellis* [1902] 2 Ch 333; *Re Fitzgerald, Surman v Fitzgerald* [1904] 1 Ch 573, CA.

7 *Van Grutten v Digby* (1862) 31 Beav 561 at 567; *Watts v Shrimpton* (1855) 21 Beav 97; *Re Bankes, Reynolds v Ellis* [1902] 2 Ch 333; *Duke of Marlborough v A-G* [1945] Ch 78 at 85-86, [1945] 1 All ER 165 at 170, CA.

8 *Van Grutten v Digby* (1862) 31 Beav 561; *Re Cigala's Settlement Trusts* (1878) 7 ChD 351; *Re Mégret, Tweedie v Maunder* [1901] 1 Ch 547; *Re Hewitt's Settlement, Hewitt v Hewitt* [1915] 1 Ch 228. Cf *Duke of Marlborough v A-G* [1945] Ch 78 at 84-87, [1945] 1 All ER 165 at 169-171, CA.

9 *Van Grutten v Digby* (1862) 31 Beav 561; *Re Mégret, Tweedie v Maunder* [1901] 1 Ch 547; *Re Bankes, Reynolds v Ellis* [1902] 2 Ch 333; *Re Fitzgerald, Surman v Fitzgerald* [1904] 1 Ch 573, CA; *Re Mackenzie, Mackenzie v Edwards-Moss* [1911] 1 Ch 578.

10 *Colliss v Hector* (1875) LR 19 Eq 334, where the settlement was held to be governed by English law (although the husband was a domiciled Turk) as the marriage had taken place on his express promise that the matrimonial domicile should be England. Cf *Van Grutten v Digby* (1862) 31 Beav 561 at 567. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

11 *Re Fitzgerald, Surman v Fitzgerald* [1904] 1 Ch 573 at 578, CA; *Re Hewitt's Settlement, Hewitt v Hewitt* [1915] 1 Ch 228; *Duke of Marlborough v A-G* [1945] Ch 78 at 85, [1945] 1 All ER 165 at 170, CA.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(5) ASSIGNMENT OF PROPERTY ON MARRIAGE/(ii) Where there is a Marriage Contract or Settlement/418. Capacity.

418. Capacity.

Although it used to be thought that the capacity of the parties to enter into a marriage contract or settlement relating to movables was governed by the law of their respective domiciles¹, the better view seems to be that this capacity is governed by the proper law of the settlement².

1 See *Re Cooke's Trusts* (1887) 56 LJCh 637; *Cooper v Cooper* (1888) 13 App Cas 88, HL.

2 *Viditz v O'Hagan* [1900] 2 Ch 87, CA (explained in Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1077-1078). See also Cheshire and North *Private International Law* (13th Edn, 1999) p 1025. For these purposes, the proper law means the system of law with which the contract is most closely related, regardless of the parties' intention: see *Cooper v Cooper* (1888) 13 App Cas 88 at 108, HL. As to the proper law of marriage contracts or settlements generally see para 417 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(5) ASSIGNMENT OF PROPERTY ON MARRIAGE/(ii) Where there is a Marriage Contract or Settlement/419. Formal validity.

419. Formal validity.

A marriage contract or settlement relating to movables is formally valid if it complies with the formal requirements either of the law of the place where it was executed¹ or of its proper law².

¹ *Guépratte v Young* (1851) 4 De G & Sm 217.

² *Watts v Shrimpton* (1855) 21 Beav 97; *Van Grutten v Digby* (1862) 31 Beav 561; *Re Barnard, Barnard v White* (1887) 56 LT 9; *Viditz v O'Hagan* [1899] 2 Ch 569 (on appeal [1900] 2 Ch 87, CA); *Re Bankes, Reynolds v Ellis* [1902] 2 Ch 333. As to the proper law of marriage contracts or settlements generally see para 417 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(5) ASSIGNMENT OF PROPERTY ON MARRIAGE/(ii) Where there is a Marriage Contract or Settlement/420. Contracts relating to immovables.

420. Contracts relating to immovables.

Where there is a marriage contract or settlement relating to immovables, it seems that the rights of husband and wife to all English immovables within its terms¹, whether possessed at the date of the marriage or acquired afterwards, are governed by the proper law of the contract or settlement², even if the settlement is implied by law³. However, the settlement will only be operative as a conveyance if it conforms to the rules of English domestic law⁴.

In so far as a marriage contract or settlement relates to foreign immovables, the rights of the parties to the marriage over such immovables are governed by the *lex situs*⁵.

1 The question whether particular immovables are within the terms of the settlement is governed by its proper law: *Callwood v Callwood* [1960] AC 659, [1960] 2 All ER 1, PC. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 As to the proper law of a marriage contract or settlement see para 417 ante.

3 *Re De Nicols, De Nicols v Curlier* [1900] 2 Ch 410. Cf *Gray v Smith* (1889) 43 ChD 208, CA. See also *Chiwel v Carlyon* (1897) 14 SC 61 (Cape of Good Hope), discussed in Cheshire and North *Private International Law* (13th Edn, 1999) pp 1023-1024. This case originated in the Chancery Division (1897A No 2919), and raised the question as to what passed as the joint or community property under a joint will of spouses made while domiciled in South Africa; the spouses subsequently settled in England and the husband acquired land there; Stirling J submitted a question of law to the Cape Supreme Court, and accepted that court's opinion that where a couple had married in South Africa under the regime of community of goods, both being domiciled there at the time of the marriage, and had afterwards settled in England where the husband bought land, the land was subject to the community and was joint estate within the terms of the joint will.

As regards contracts subject to English law, note the provisions of the Law of Property (Miscellaneous Provisions) Act 1989 s 2, which requires all dispositions of an interest in land (with certain exceptions, notably regarding the creation or operation of resulting, implied or constructive trusts), to be in writing (see SALE OF LAND vol 42 (Reissue) para 29).

4 *Re De Nicols, De Nicols v Curlier* [1900] 2 Ch 410 at 416. Cf *Callwood v Callwood* [1960] AC 659 at 683, [1960] 2 All ER 1 at 10, PC (devolution of immovables).

5 *Re Fitzgerald, Surman v Fitzgerald* [1904] 1 Ch 573 at 588, CA; *Re Pearse's Settlement, Pearse v Pearse* [1909] 1 Ch 304. See also paras 399-404 ante. As to the *lex situs* generally see para 380 ante. As to the *lex situs* as it relates to foreign immovables see para 399 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(5) ASSIGNMENT OF PROPERTY ON MARRIAGE/(ii) Where there is a Marriage Contract or Settlement/421. Variation of settlements.

421. Variation of settlements.

The English court¹ has jurisdiction to vary any antenuptial or postnuptial settlement on or after granting a decree of divorce, nullity of marriage or judicial separation², even if the settlement is governed by foreign law and comprises property situated in a foreign country³. The jurisdiction will not be exercised if an order of the court would be ineffective in the foreign country⁴, and in such a case the court may set aside service abroad on the foreign trustees of the settlement⁵. The court has similar powers in certain cases where the decree has been pronounced by a foreign court⁶.

1 For the meaning of 'court' see para 284 note 1 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See the Matrimonial Causes Act 1973 s 24(1)(c) (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 510.

3 *Nunneley v Nunneley and Marrian* (1890) 15 PD 186; *Forsyth v Forsyth* [1891] P 363; *Goff v Goff* [1934] P 107. Cf *De Ricci v De Ricci* [1891] P 378; *Hunter v Hunter and Waddington* [1962] P 1, [1961] 2 All ER 121. As to the variation of trusts see para 431 post.

4 *Tallack v Tallack and Broekema* [1927] P 211; *Goff v Goff* [1934] P 107. Cf *Wyler v Lyons* [1963] P 274, [1963] 1 All ER 821 (distinguished in *Razelos v Razelos* [1969] 3 All ER 929 at 936, sub nom *Razelos v Razelos (No 2)* [1970] 1 WLR 392 at 403-404; for further proceedings see [1970] 1 All ER 386n, [1970] 1 WLR 390).

5 *Goff v Goff* [1934] P 107.

6 See the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) (as amended); and para 291 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(6) GOVERNMENTAL SEIZURE OF PROPERTY/422. Effect of foreign decrees.

(6) GOVERNMENTAL SEIZURE OF PROPERTY

422. Effect of foreign decrees.

A decree of a foreign government¹ which purports to seize private property situated² in the territory controlled by that government³ will be recognised in England as having deprived the owner of his interest in the property to the extent provided in the decree⁴, even if the owner is not a national of the foreign state⁵, and even if the property is later brought to England⁶. On the other hand, such a decree will not be recognised in England as having any effect on the ownership of property situated outside the territory controlled by the foreign government at the time of the decree, even if the owner is a national of the foreign state⁷. However, if the foreign government is in possession or control of the property, the owner cannot recover it by legal process in England, because his action would be stayed if the foreign government pleaded sovereign immunity⁸.

The rules stated above apply to immovables and to chattels and to intangible movables. With regard to contractual rights, the applicable law of the contract⁹ giving rise to the debt will govern the various ways of extinguishing obligations under the contract¹⁰. Although there is no authority on the point, this would seem to include the extinguishing of contractual obligations by a foreign governmental decree.

1 The principles set out in the text and notes 2-10 *infra* formerly applied to governments recognised either *de jure* or *de facto* by Her Majesty's government in the United Kingdom. However, it is no longer the practice of Her Majesty's government to accord recognition to foreign governments (although it will continue to recognise foreign states): see the announcement made by the Foreign and Commonwealth Office in (1980) 51 BYIL 367-368; and Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 997-998. Whether a body purporting to be a government will be so treated by the English court depends on a number of factors: whether it is the constitutional government of the state; the degree, nature and stability of its administrative control over the territory of the state; the existence, extent and nature of any dealings between it and Her Majesty's government; and, in marginal cases, the extent of international recognition it enjoys as the government of the state: *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA, The Mary* [1993] QB 54, [1993] 1 All ER 371. See *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, [1966] 2 All ER 536, HL; *GUR Corp v Trust Bank of Africa* [1987] QB 599, [1986] 3 All ER 449, DC. See also INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 44 *et seq.* As to the meanings of 'England', 'English' and 'English law' see para 4 *ante*.

Under the former recognition practice, the doctrine of the retroactive effect of recognition might render it immaterial that recognition was not granted until after the decree was made: *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532, CA. Cf *Gdynia Ameryka Linie Zeglugowe Spolka Akcyjina v Boguslawski* [1953] AC 11, [1952] 2 All ER 470, HL; *Civil Air Transport Inc v Central Air Transport Corp* [1953] AC 70, [1952] 2 All ER 733, PC.

2 As to the location of property see paras 385-391 *ante*.

3 Where there are two governments claiming to represent the same state, the competence of each is limited to the area under its effective control: *Banco de Bilbao v Sancha* [1938] 2 KB 176, [1938] 2 All ER 253, CA; *Spain v The Arantzazu Mendi* [1939] AC 256, [1939] 1 All ER 719, HL. See also *Bank of Ethiopia v National Bank of Egypt and Liguori* [1937] Ch 513, [1937] 3 All ER 8.

4 *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532, CA; *Russian Commercial and Industrial Bank v Comptoir d'Escompte de Mulhouse* [1925] AC 112 at 124, HL; *Princess Paley Olga v Weisz* [1929] 1 KB 718, CA; *Re Banque des Marchands de Moscou (Koupetschesky), Royal Exchange Assurance Co v Liquidator* [1952] 1 All ER 1269; *Jabbour v Custodian of Israeli Absentee Property* [1954] 1 All ER 145 at 153-154, [1954] 1 WLR 139 at 152; *Re Banque des Marchands de Moscou (Koupetschesky)* [1954] 2 All ER 746, [1954] 1 WLR 1108; *Re Helbert Wagg & Co Ltd's Claim* [1956] Ch 323 at 344-345, [1956] 1 All ER 129 at 138.

5 *Perry v Equitable Life Assurance Society of United States of America* (1929) 45 TLR 468; *Re Banque des Marchands de Moscou (Koupetschesky), Royal Exchange Assurance Co v Liquidator* [1952] 1 All ER 1269; *Re Helbert Wagg & Co Ltd's Claim* [1956] Ch 323 at 344-349, [1956] 1 All ER 129 at 138-140 (not following *The Rose Mary* [1953] 1 WLR 246, Aden SC).

6 *Aksionairnoye Obsechestvo AM Luther v James Sagor & Co* [1921] 3 KB 532, CA; *Princess Paley Olga v Weisz* [1929] 1 KB 718, CA.

7 *Folliott v Ogden* (1789) 1 Hy Bl 124 (affd sub nom *Ogden v Folliott* (1790) 3 Term Rep 726); *Lecouturier v Rey* [1910] AC 262, HL; *The Jupiter (No 3)* [1927] P 122 at 144 (affd [1927] P 250, CA); *Employers' Liability Assurance Corp'n Ltd v Sedgwick, Collins & Co Ltd* [1927] AC 95 at 102, HL; *Re Russian Bank for Foreign Trade* [1933] Ch 745 at 767; *Government of the Republic of Spain v National Bank of Scotland* 1939 SC 413; *Frankfurter v WL Exner Ltd* [1947] Ch 629; *Novello & Co Ltd v Hinrichsen Edition Ltd* [1951] Ch 595, [1951] 1 All ER 779 (affd on other grounds [1951] Ch 1026, [1951] 2 All ER 457, CA); *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248, [1951] 2 All ER 779 (not following *Lorentzen v Lydden & Co Ltd* [1942] 2 KB 202); *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368, [1986] 1 All ER 129, HL. See also *Kuwait Airways Corp'n v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883, [2002] 3 All ER 209 (foreign legislation imposed on another state in breach of international law was held to be extra-territorial in its effect and did not govern the title to property stolen from that other state's territory); *Peer International Corp'n v Termidor Music Publishers Ltd (Editora Musical de Cuba, Pt 20 defendants)* [2002] EWHC 2675 (Ch), (2003) Times, 2 January (Cuban decree depriving claimant of copyright in musical works situated in England was unenforceable since the property, whether corporeal or incorporeal, was to be determined in accordance with English law).

8 *Compania Naviera Vascongado v SS Cristina* [1938] AC 485, [1938] 1 All ER 719, HL; *Spain v The Arantzazu Mendi* [1939] AC 256, [1939] 1 All ER 719, HL.

9 The applicable law determined in accordance with the Rome Convention (see para 349 et seq ante), which does not apply to contracts made on or before 1 April 1991 (see paras 349 note 6, 350 ante). As to the Rome Convention see para 349 note 2 ante. With regard to those rare contracts to which the Convention does not apply, reference to the proper law of the contract may be necessary: see *Perry v Equitable Life Assurance Society of United States of America* (1929) 45 TLR 468; *Re Helbert Wagg & Co Ltd's Claim* [1956] Ch 323, [1956] 1 All ER 129. For the meaning of 'the proper law (of a contract)' see para 349 note 7 ante.

10 See the Rome Convention art 10 para 1(c); and para 365 ante. Note, however, the public policy provision contained in art 16: see para 358 ante.

UPDATE

422 Effect of foreign decrees

NOTE 7--*Peer International*, cited, affirmed: [2003] EWCA Civ 1156, [2004] QB 212, overruling *Lorentzen v Lydden*, cited.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(6) GOVERNMENTAL SEIZURE OF PROPERTY/423. Penal decrees.

423. Penal decrees.

The English¹ court will not enforce a foreign penal law². Hence, if the foreign governmental decree which purports to expropriate private property is penal, that is an additional reason for not giving it extra-territorial effect³. If the property is in England at the time of the action, it may also be a reason for not recognising its effect on property situated within the territory controlled by the foreign government at the time of the decree⁴.

It is impossible to define precisely what decrees are likely to be treated as penal, but it seems that one which is directed against the property of a particular individual⁵ or of a particular company⁶ or of persons of a particular race⁷ or of a particular alien nationality⁸ may be so treated. A decree is not necessarily penal merely because no compensation, or inadequate compensation, is payable to the owner under it⁹. In general, the English court is not concerned with the political merits or demerits of the decree. Thus it will not give an extra-territorial effect to a decree requisitioning private property merely because the foreign government was an ally of the United Kingdom during a war and the object of the decree was to prevent the property from falling into enemy hands¹⁰.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See para 32 ante.

3 *Banco de Vizcaya v Don Alfonso de Borbon y Austria* [1935] 1 KB 140.

4 *Folliott v Ogden* (1789) 1 Hy Bl 124 (affd sub nom *Ogden v Folliott* (1790) 3 Term Rep 726); *The Rose Mary* [1953] 1 WLR 246, Aden SC (as explained in *Re Helbert Wagg & Co Ltd's Claim* [1956] Ch 323 at 346, [1956] 1 All ER 129 at 139).

5 *Banco de Vizcaya v Don Alfonso de Borbon y Austria* [1935] 1 KB 140.

6 *The Rose Mary* [1953] 1 WLR 246, Aden SC (as explained in *Re Helbert Wagg & Co Ltd's Claim* [1956] Ch 323 at 346, [1956] 1 All ER 129 at 139).

7 *Frankfurter v WL Exner Ltd* [1947] Ch 629; *Novello & Co Ltd v Hinrichsen Edition Ltd* [1951] Ch 595, [1951] 1 All ER 779 (affd [1951] Ch 1026, [1951] 2 All ER 457, CA).

8 *Wolff v Oxholm* (1817) 6 M & S 92; *Re Friedrich Krupp AG* [1917] 2 Ch 188; *Re Helbert Wagg & Co Ltd's Claim* [1956] Ch 323 at 345-346, [1956] 1 All ER 129 at 138-139.

9 *Aksionairnoye Obschestvo AM Luther v James Sagor & Co* [1921] 3 KB 532, CA; *Princess Paley Olga v Weisz* [1929] 1 KB 718, CA; *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248 at 258, 260-263, [1951] 2 All ER 779 at 787, 788-790; *Re Helbert Wagg & Co Ltd's Claim* [1956] Ch 323 at 349, [1956] 1 All ER 129 at 140. Cf *AS Tallina Laevauhisus v Estonian State SS Line* (1947) 80 Ll L Rep 99 at 111, CA.

10 *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248, [1951] 2 All ER 779, not following *Lorentzen v Lydden & Co Ltd* [1942] 2 KB 202.

UPDATE

423 Penal decrees

NOTE 10--*Lorentzen v Lydden*, cited, overruled: *Peer International Corp'n v Termidor Music Publishers Ltd* [2003] EWCA Civ 1156, [2004] QB 212 (see PARA 422).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(7) TRUSTS/(i) Recognition of Trusts/424. Introduction.

(7) TRUSTS

(i) Recognition of Trusts

424. Introduction.

The Recognition of Trusts Act 1987 gives effect in the United Kingdom to the main provisions of the Hague Convention which specifies the law applicable to trusts and governs their recognition¹. The Act binds the Crown². The Act may be extended by Order in Council³ to the Isle of Man, any of the Channel Islands or any colony⁴.

1 The Convention on the law applicable to trusts and on their recognition, which was adopted in draft form by the Hague Conference on Private International Law on 20 October 1984 (Cmnd 9494) and signed by the United Kingdom on 10 January 1986: see art 1. The provisions of the Convention which have the force of law in the United Kingdom are set out in the Recognition of Trusts Act 1987 s 1(1), Schedule. Articles 13, 19-21 of the Convention are not included in the Schedule to the Recognition of Trusts Act 1987. For the meaning of 'United Kingdom' see para 4 ante.

2 Ibid s 3(3).

3 Such an Order in Council may modify the Act and contain supplementary provisions: see ibid s 2(3). An Order in Council is subject to annulment in pursuance of a resolution of either House of Parliament: s 2(4).

4 Ibid s 2(2); and see the Recognition of Trusts Act 1987 (Overseas Territories) Order 1989, SI 1989/673, which provides for the application of the Recognition of Trusts Act 1987, with modifications, to Bermuda, British Antarctic Territory, the Falkland Islands, St Helena and Dependencies, South Georgia and the South Sandwich Islands, Akrotiri and Dhekelia, and the Virgin Islands.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(7) TRUSTS/(i) Recognition of Trusts/425. General provisions.

425. General provisions.

The Hague Convention¹ applies to trusts² regardless of the date on which they were created³. However, this is not to be construed as affecting the law to be applied in relation to anything done or omitted before 1 August 1987⁴. The provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy⁵.

1 As to the Hague Convention see para 424 note 1 ante. The provisions of the Convention which have the force of law in the United Kingdom are set out in the Recognition of Trusts Act 1987 s 1(1), Schedule. For the meaning of 'United Kingdom' see para 4 ante.

2 For the meaning of 'trust' see para 426 post.

3 Recognition of Trusts Act 1987 Schedule art 22.

4 Ibid s 1(5); Recognition of Trusts Act 1987 (Commencement) Order 1987, SI 1987/1177.

5 Recognition of Trusts Act 1987 Schedule art 18.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(7) TRUSTS/(i) Recognition of Trusts/426. Scope of the Hague Convention.

426. Scope of the Hague Convention.

In the Hague Convention¹, the term 'trust' refers to the legal relationship created, inter vivos or on death, by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose². A trust has the following characteristics:

- 407 (1) the assets constitute a separate fund and are not a part of the trustee's own estate;
- 408 (2) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee; and
- 409 (3) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law³.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust⁴. The Convention applies only to trusts created voluntarily and evidenced in writing⁵. In the United Kingdom, however, the provisions of the Convention, so far as applicable⁶, have effect also in relation to any other trusts of property arising under the law of any part of the United Kingdom or by virtue of a judicial decision whether in the United Kingdom or elsewhere⁷. The Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee⁸, nor does it apply to the extent that the applicable law⁹ does not provide for trusts or the category of trusts involved¹⁰.

1 As to the Hague Convention see para 424 note 1 ante. The provisions of the Convention which have the force of law in the United Kingdom are set out in the Recognition of Trusts Act 1987 s 1(1), Schedule. For the meaning of 'United Kingdom' see para 4 ante.

2 Ibid Schedule art 1.

3 Ibid Schedule art 2(a)-(c).

4 Ibid Schedule art 2.

5 Ibid Schedule art 3.

6 For a discussion of the trusts to which this may apply see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1088.

7 Recognition of Trusts Act 1987 s 1(2). This allows the United Kingdom to meet its obligations under the Brussels Convention art 5 para 6 (see para 92 text and note 6 ante): see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1088. As to the Brussels Convention see para 65 note 2 ante.

8 Recognition of Trusts Act 1987 Schedule art 4.

9 ie the law specified by ibid Schedule Ch II (arts 6-10) as the applicable law (see para 427 post): Schedule art 5.

10 Ibid Schedule art 5.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(7) TRUSTS/(i) Recognition of Trusts/427. Applicable law.

427. Applicable law.

Under the Hague Convention¹, a trust² is governed by the law³ chosen by the settlor; the choice must be express or be implied in the terms of the instrument creating, or the writing evidencing, the trust, interpreted, if necessary, in the light of the circumstances of the case⁴. Where no applicable law has been chosen (or where the chosen law does not provide for trusts or the category of trust involved⁵), a trust is governed by the law with which it is most closely connected⁶. In ascertaining the law with which a trust is most closely connected reference is to be made in particular to:

- 410 (1) the place of administration of the trust designated by the settlor;
- 411 (2) the situs of the assets of the trust;
- 412 (3) the place of residence or business of the trustee; and
- 413 (4) the objects of the trust and the places where they are to be fulfilled⁷.

The Hague Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act⁸, relating in particular to:

- 414 (a) the protection of minors and incapable parties;
- 415 (b) the personal and proprietary effects of marriage;
- 416 (c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives;
- 417 (d) the transfer of title property and security interests in property;
- 418 (e) the protection of creditors in matters of insolvency;
- 419 (f) the protection, in other respects, of third parties acting in good faith⁹.

Nor does the Convention prevent the application of those provisions of the law of the forum which must be applied even to international situations, irrespective of rules of conflict of laws¹⁰.

The Rome Convention on the law applicable to contractual obligations¹¹ does not apply to the constitution of trusts or the relationship between settlors, trustees and beneficiaries, and so does not prejudice the application of the Hague Convention¹².

1 As to the Hague Convention see para 424 note 1 ante. The provisions of the Convention which have the force of law in the United Kingdom are set out in the Recognition of Trusts Act 1987 s 1(1), Schedule. For the meaning of 'United Kingdom' see para 4 ante.

2 For the meaning of 'trust' see para 426 ante.

3 For these purposes, 'law' means the rules of law in force in a state other than its rules of conflict of laws: Recognition of Trusts Act 1987 Schedule art 17. The reference to a state includes a reference to any country or territory (whether or not a party to the Hague Convention and whether or not forming part of the United Kingdom) which has its own system of law: Recognition of Trusts Act 1987 s 1(4).

4 Ibid Schedule art 6. Extrinsic evidence cannot be admitted to impugn what is stated in the choice of law clause: *Tod v Barton* [2002] EWHC 265 (Ch), 4 ITELR 715.

5 Recognition of Trusts Act 1987 Schedule art 6.

6 Ibid Schedule art 7.

- 7 Ibid Schedule art 7 (a)-(d).
- 8 Ibid s 1(3), Schedule art 15. These may be referred to as the 'mandatory rules'.
- 9 Ibid s 1(3), Schedule art 15(a)-(f).
- 10 Ibid s 1(3), Schedule art 16.
- 11 As to the Rome Convention see para 349 note 2 ante.
- 12 See the Rome Convention art 1 para 2(g); and para 350 text and note 13 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(7) TRUSTS/(i) Recognition of Trusts/428. Scope of the applicable law.

428. Scope of the applicable law.

Under the Hague Convention¹, the applicable law² governs the validity of the trust³, its construction, its effects and the administration of the trust⁴. In particular it governs:

- 420 (1) the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee⁵;
- 421 (2) the rights and duties of trustees among themselves⁶;
- 422 (3) the right of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers⁷;
- 423 (4) the power of trustees to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets⁸;
- 424 (5) the powers of investment of trustees⁹;
- 425 (6) restrictions upon the duration of the trust, and upon the power to accumulate the income of the trust¹⁰;
- 426 (7) the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries¹¹;
- 427 (8) the variation or termination of the trust¹²;
- 428 (9) the distribution of the trust assets¹³; and
- 429 (10) the duty of trustees to account for their administration¹⁴.

A severable aspect of the trust, particularly matters of administration, may be governed by a different law¹⁵. The law applicable to the validity of the trust determines whether that law or the law governing a severable aspect of the trust may be replaced by another law¹⁶.

1 As to the Hague Convention see para 424 note 1 ante. The provisions of the Convention which have the force of law in the United Kingdom are set out in the Recognition of Trusts Act 1987 s 1(1), Schedule. For the meaning of 'United Kingdom' see para 4 ante.

2 I.e. the law as determined in accordance with *ibid* Schedule arts 6, 7 (see para 427 ante).

3 For the meaning of 'trust' see para 426 ante.

4 Recognition of Trusts Act 1987 Schedule art 8.

5 *Ibid* Schedule art 8(a).

6 *Ibid* Schedule art 8(b).

7 *Ibid* Schedule art 8(c).

8 *Ibid* Schedule art 8(d).

9 *Ibid* Schedule art 8(e).

10 *Ibid* Schedule art 8(f).

11 *Ibid* Schedule art 8(g).

12 *Ibid* Schedule art 8(h). See eg *Tod v Barton* [2002] EWHC 265 (Ch), 4 ITELR 715. As to the court's jurisdiction to vary a trust see para 431 post.

13 Recognition of Trusts Act 1987 Schedule art 8(i).

14 Ibid Schedule art 8(j).

15 Ibid Schedule art 9. The English courts will not lightly treat different parts of the trust property as governed by different laws. Cf *Re Fitzgerald* [1904] 1 Ch 573, CA. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. The administration of a trust will normally be governed by the applicable law rather than some other law, but contrast *Chellaram v Chellaram* [1985] Ch 409, [1985] 1 All ER 1043.

16 Recognition of Trusts Act 1987 Schedule art 10. Cf *Re Fitzgerald* [1904] 1 Ch 573, CA; *Re Hewitt's Settlement* [1915] 1 Ch 228; *Duke of Marlborough v A-G* [1945] Ch 78, [1945] 1 All ER 165, CA.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(7) TRUSTS/(i) Recognition of Trusts/429. Trusts not within the scope of the Hague Convention.

429. Trusts not within the scope of the Hague Convention.

There is little authority on the conflict of laws rules applicable to a trust which is not within the scope of the Hague Convention¹. The applicable principles appear to be very similar to those applying under the Convention; thus the trust is governed by the law chosen by the settlor or, in the absence of such a choice, by the law with which the trust is most closely connected².

¹ As to the Hague Convention see para 424 note 1 ante. The provisions of the Convention which have the force of law in the United Kingdom are set out in the Recognition of Trusts Act 1987 s 1(1), Schedule. For the meaning of 'United Kingdom' see para 4 ante.

² *A-G v Campbell* (1872) LR 5 HL 524; *Duke of Marlborough v A-G* [1945] Ch 78, [1945] 1 All ER 165, CA; *Iveagh v IRC* [1954] Ch 364, [1954] 1 All ER 609; *Chellaram v Chellaram* [1985] Ch 409, [1985] 1 All ER 1043; *Revenue Comrs v Pelly* [1940] IR 122. See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1088.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(7) TRUSTS/(i) Recognition of Trusts/430. Recognition of trusts.

430. Recognition of trusts.

A trust¹ created in accordance with the law applicable under the Hague Convention² is to be recognised as a trust³. Such recognition implies, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity⁴.

In so far as the law applicable to the trust requires or provides, such recognition implies in particular⁵:

- 430 (1) that personal creditors of the trustee have no recourse against the trust assets⁶;
- 431 (2) that the trust assets do not form part of the trustee's estate upon his insolvency or bankruptcy⁷;
- 432 (3) that the trust assets do not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death⁸;
- 433 (4) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets⁹.

A trustee desiring to register assets, movable or immovable, or documents of title to them, is entitled, in so far as this is not prohibited by or inconsistent with the law of the state where registration is sought, to do so in his capacity as trustee or in such other way that the existence of the trust is disclosed¹⁰.

The Convention does not prevent the application of rules of law more favourable to the recognition of trusts¹¹.

If recognition of a trust is prevented by the application of mandatory rules of the law designated by the conflict of law rules of the forum¹², the court must try to give effect to the objects of the trust by other means¹³.

1 For the meaning of 'trust' see para 426 ante.

2 As to the Hague Convention see para 424 note 1 ante. The provisions of the Convention which have the force of law in the United Kingdom are set out in the Recognition of Trusts Act 1987 s 1(1), Schedule. For the meaning of 'United Kingdom' see para 4 ante. As to the determination of the applicable law see para 427 ante.

3 Ibid Schedule art 11 1st para.

4 Ibid Schedule art 11 2nd para.

5 Ibid Schedule art 11 3rd para.

6 Ibid Schedule art 11(a).

7 Ibid Schedule art 11(b).

8 Ibid Schedule art 11(c).

9 Ibid Schedule art 11(d). However, the rights and obligations of any third party holder of the assets remain subject to the law determined by the choice of law rules of the forum: Schedule art 11(d).

10 Ibid Schedule art 12.

- 11 Ibid Schedule art 14.
- 12 Ie the provisions set out in para 427 text and notes 8-9 ante.
- 13 Recognition of Trusts Act 1987 s 1(3), Schedule art 15.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/8. PROPERTY/(7) TRUSTS/(ii) Variation of Trusts/431. Variation of trusts.

(ii) Variation of Trusts

431. Variation of trusts.

The variation of trusts is governed by the law identified by the Hague Convention¹ as governing the trust².

As to jurisdiction, the English court³ has power to approve any arrangement varying or revoking all or any of the trusts on which property is held under any will, settlement or other disposition⁴, even if the settlement is governed by foreign law⁵. The jurisdiction is unlimited⁶, but where there are substantial foreign elements in the case the court will consider carefully whether it is proper for it to exercise the jurisdiction⁷. The jurisdiction may be exercised to convert an English settlement into a settlement governed by foreign law⁸.

1 As to the Hague Convention see para 424 note 1 ante. The provisions of the Convention which have the force of law in the United Kingdom are set out in the Recognition of Trusts Act 1987 s 1(1), Schedule. For the meaning of 'United Kingdom' see para 4 ante. As to the determination of the applicable law see para 427 ante.

2 See *ibid* Schedule art 8(h); and para 428 text and note 12 ante.

3 I.e. the High Court or a county court: see the Variation of Trusts Act 1958 s 1(3) (amended by the County Courts Act 1959 s 204, Sch 3; the Mental Health Act 1959 s 149(1), Sch 7 Part I; and the Mental Health Act 1983 s 148, Sch 4 para 14); and the County Courts Act 1984 s 23(b). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 See the Variation of Trusts Act 1958 s 1(1); and TRUSTS vol 48 (2007 Reissue) paras 1062-1063.

5 *Re Ker's Settlement Trusts* [1963] Ch 553, [1963] 1 All ER 801; *Re Paget's Settlement* [1965] 1 All ER 58, [1965] 1 WLR 1046.

6 *Re Ker's Settlement Trusts* [1963] Ch 553 at 556, [1963] 1 All ER 801 at 802-803; *Re Paget's Settlement* [1965] 1 All ER 58 at 60-61, [1965] 1 WLR 1046 at 1050.

7 *Re Paget's Settlement* [1965] 1 All ER 58, [1965] 1 WLR 1046.

8 *Re Seale's Marriage Settlement* [1961] Ch 574, [1961] 3 All ER 136; *Re Weston's Settlements, Weston v Weston* [1969] 1 Ch 223, [1968] 3 All ER 338, CA; *Re Windeatt's Will Trusts* [1969] 2 All ER 324, [1969] 1 WLR 692; *Re Whitehead's Will Trusts, Burke v Burke* [1971] 2 All ER 1334, [1971] 1 WLR 833. See also TRUSTS vol 48 (2007 Reissue) para 863.

UPDATE

431 Variation of trusts

NOTE 3--1958 Act s 1(3) further amended and 1983 Act Sch 4 para 14 repealed: Mental Capacity Act 2005 Sch 6 para 9(a), Sch 7.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(1) ADMINISTRATION OF ESTATES/(i) Law governing Administration/432. Choice of law.

9. SUCCESSION

(1) ADMINISTRATION OF ESTATES

(i) Law governing Administration

432. Choice of law.

The administration of a deceased person's assets is governed by the law of the country from which the personal representative derives his authority to collect them¹. Thus irrespective of whether the administration is principal or ancillary², assets administered by an English personal representative³ must be administered according to English law⁴, and assets administered by a foreign personal representative⁵ must be administered according to the law of that foreign country⁶.

A personal representative who has collected assets in a foreign country under a grant obtained there is thus entitled to hold them against a personal representative under an English grant⁷, and a personal representative under an English grant is not accountable in his capacity as personal representative for assets received by him under a foreign grant⁸.

1 *Preston v Melville* (1841) 8 Cl & Fin 1, HL; *Blackwood v R* (1882) 8 App Cas 82, PC; *Re Kloebe, Kannreuther v Geiselbrecht* (1884) 28 ChD 175; *Ewing v Orr Ewing* (1885) 10 App Cas 453, HL; *Re Lorillard, Griffiths v Catforth* [1922] 2 Ch 638, CA; *Re Wilks, Keefer v Wilks* [1935] Ch 645; *Re Kehr, Martin v Foges* [1952] Ch 26, [1951] 2 All ER 812. As to the appointment and powers of personal representatives generally see EXECUTORS AND ADMINISTRATORS.

2 Principal administration is administration of the deceased's assets under the authority of the country of the deceased's domicile; ancillary administration is administration under the authority of some other country.

3 I.e. a person administering the assets under the authority of English domestic law, either by virtue of entitlement to an English grant of probate as an executor, or by virtue of an English grant of letters of administration. For present purposes, an English personal representative includes a personal representative acting under a grant resealed in England pursuant to the Colonial Probates Act 1892 or under a Scottish confirmation or Northern Irish grant of representation recognised by virtue of the Administration of Estates Act 1971 s 1: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 238 et seq. See also Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1012-1013. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 See the cases cited in note 1 supra; and paras 435-438 post.

5 I.e. a person administering the assets under the authority of the law of a foreign country, in some cases by virtue of a grant from the courts of that country, but not in all cases: see eg *Re Achilopoulos, Johnson v Mavromichali* [1928] Ch 433.

6 *Huthwaite v Phaire* (1840) 1 Man & G 159; *Cook v Gregson* (1854) 2 Drew 286 (assets prematurely transmitted to another country directed to be administered according to the law of the country in which they were collected).

7 *Currie v Bircham* (1822) 1 Dow & Ry KB 35; *Jauncy v Sealey* (1686) 1 Vern 397. There is an exception to this in the case of an administration action: see para 434 post.

8 See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1015-1016. There is an exception to this in the case of an administration action: see para 434 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(1) ADMINISTRATION OF ESTATES/(i) Law governing Administration/433. Administration and succession distinguished.

433. Administration and succession distinguished.

Administration does not include the distribution to beneficiaries of the deceased's net assets after payment of all debts, duties and expenses¹: this is a matter of succession, which is governed by separate rules². The rules of English domestic law relating to the order of payment of debts³, and the power to postpone sale of assets⁴ and to make payments out of the estate for the maintenance or advancement of minor beneficiaries⁵, are rules of administration; the rules of English law which determine the order of application of assets in payment of debts or legacies are rules of succession⁶.

1 *Re Wilks, Keefer v Wilks* [1935] Ch 645 at 648.

2 See paras 441-464 post.

3 *Re Kloebe, Kannreuther v Geiselbrecht* (1884) 28 ChD 175; *Re Lorillard, Griffiths v Catforth* [1922] 2 Ch 638, CA. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. For the meaning of 'English domestic law' see para 2 note 3 ante.

4 *Re Wilks, Keefer v Wilks* [1935] Ch 645.

5 *Re Kehr, Martin v Foges* [1952] Ch 26, [1951] 2 All ER 812.

6 *Re Hewit, Lawson v Duncan* [1891] 3 Ch 568.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(1) ADMINISTRATION OF ESTATES/(i) Law governing Administration/434. Administration actions.

434. Administration actions.

An order of the English¹ court for the judicial administration of a deceased person's estate will normally extend to all his assets, wherever situated². The court will require all claims to be proved in the administration, and may restrain English creditors from proceeding against the estate in foreign courts³. The order does not make a foreign personal representative outside the jurisdiction accountable for his administration except with regard to those of the deceased's assets which he has brought to England before so appropriating them as to take them out of the deceased's estate⁴. If he is personally within the jurisdiction, he is also accountable under the order, in his capacity as trustee of the will, for the ultimate distribution to beneficiaries of the deceased's net assets wherever situated⁵.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Ewing v Orr Ewing* (1883) 9 App Cas 34, HL; subsequent proceedings (1885) 10 App Cas 453, HL.

3 *Bunbury v Bunbury* (1839) 8 LJCh 297; *Graham v Maxwell* (1849) 1 Mac & G 71; *Carron Iron Co v Maclaren* (1855) 5 HL Cas 416; *Maclaren v Stainton*, *Maclaren v Carron Co* (1855) 26 LJCh 332; *Re Boyse*, *Crofton v Crofton* (1880) 15 ChD 591; *Hope v Carnegie* (1866) 1 Ch App 320; *Baillie v Baillie* (1867) LR 5 Eq 175; *Re Low*, *Bland v Low* [1894] 1 Ch 147, CA. See also paras 130-133 ante.

4 *Lowe v Farlie* (1817) 2 Madd 101; *Logan v Fairlie* (1825) 2 Sim & St 284 (revsd on another point (1835) 1 My & Cr 59); *Sandilands v Innes* (1829) 3 Sim 263; *Tyler v Bell* (1837) 2 My & Cr 89; *Bond v Graham* (1842) 1 Hare 482; *Hervey v Fitzpatrick* (1854) Kay 421. In such a case the English personal representative must be a party to the action: see the cases cited supra; and CPR 64.4(1). The English personal representative does not have to be a party to any action for execution of trusts brought by beneficiaries against a foreign personal representative who holds appropriated funds as a trustee for the beneficiaries: *Arthur v Hughes* (1841) 4 Beav 506.

5 *Ewing v Orr Ewing* (1883) 9 App Cas 34, HL; subsequent proceedings (1885) 10 App Cas 453, HL.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(1) ADMINISTRATION OF ESTATES/(ii) Position of English Personal Representatives/435. Effect of English grant.

(ii) Position of English Personal Representatives

435. Effect of English grant.

An English grant of representation¹ vests in the personal representative all the deceased's movable and immovable estate² which at the date of his death is situated in England³. It does not vest in him assets outside England⁴, that matter being governed by the law of the country where they are situated⁵. However, where such foreign assets are brought into England before any person has acquired a title to them under their *lex situs*, they will vest in the English personal representative by virtue of his grant⁶.

1 As to the English court's jurisdiction to make a grant, the types of grant which may be obtained, and the law, practice and procedure for obtaining a grant see generally EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 72 et seq. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 This is subject to certain exceptions in the case of certain kinds of property, eg settled land, as to which see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 229 et seq.

3 *A-G v Dimond* (1831) 1 Cr & J 356; *A-G v Hope* (1834) 1 Cr M & R 530, HL; *Blackwood v R* (1882) 8 App Cas 82, PC; *Re Fitzpatrick, Bennett v Bennett* [1952] Ch 86, [1951] 2 All ER 949.

4 See the cases cited in note 3 supra.

5 See para 432 ante. If the deceased died domiciled in England, the English personal representative has at most a 'generally recognised claim' to a local grant: *Blackwood v R* (1882) 8 App Cas 82 at 92, PC.

6 *Whyte v Rose* (1842) 3 QB 493 at 506, Ex Ch. A personal representative's title under the *lex situs* to assets which have been reduced into his possession before they are brought to England will be recognised in England: see para 439 post. As to the *lex situs* see para 380 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(1) ADMINISTRATION OF ESTATES/(ii) Position of English Personal Representatives/436. Collection of assets.

436. Collection of assets.

An English personal representative is entitled to seek to collect assets of the deceased which are situated in another country, and he is accountable in England for all such assets as he may collect in his capacity as the English personal representative¹. If the deceased died domiciled in England, and there are insufficient assets in England to meet his debts, the personal representative may be under a duty to seek to collect foreign assets². If there are sufficient assets in England to pay the debts, he is under no duty to collect specifically bequeathed movables situated abroad, and he is entitled simply to assent to their vesting in the legatee and to leave him to bear any foreign duty in respect of them³ and the cost of their transport to England⁴.

1 *Dowdale's Case* (1604) 6 Co Rep 46b; *Atkins v Smith* (1740) 2 Atk 63; *Whyte v Rose* (1842) 3 QB 493, Ex Ch; *Re Scott, Scott v Scott* [1916] 2 Ch 268, CA. He is not accountable in England in his capacity as foreign personal representative, except in an administration action: see paras 432, 434 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Re Fitzpatrick, Bennett v Bennett* [1952] Ch 86 at 87-88, [1951] 2 All ER 949 at 949.

3 *Re Scott, Scott v Scott* [1915] 1 Ch 592, CA.

4 *Re Fitzpatrick, Bennett v Bennett* [1952] Ch 86, [1951] 2 All ER 949.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(1) ADMINISTRATION OF ESTATES/(ii) Position of English Personal Representatives/437. Payment of debts.

437. Payment of debts.

Wherever they have been collected, assets which have come into the hands of an English personal representative in his capacity as such are available for all the deceased's debts, wherever they have been incurred, without distinction between English and foreign creditors¹. The English personal representative must follow the order of priority prescribed by English law², although where foreign creditors have, as such, received a preference in respect of assets in their own country, he may be required to adjust the order of priority so that they do not receive payment before English creditors have been paid a proportionate amount³. An English ancillary personal representative need not advertise for foreign claims⁴.

1 *Re Kloebe, Kannreuther v Geiselbrecht* (1884) 28 ChD 175. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Re Kloebe, Kannreuther v Geiselbrecht* (1884) 28 ChD 175; *Re Bowes, Earl of Strathmore v Vane* [1889] WN 53 (on appeal [1889] WN 138, CA); *Re Doetsch, Matheson v Ludwig* [1896] 2 Ch 836; *Re Smith, Smith v Smith* [1913] 2 Ch 216; *Re Lorillard, Griffiths v Catforth* [1922] 2 Ch 638, CA. See also EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 386.

3 *Re Kloebe, Kannreuther v Geiselbrecht* (1884) 28 ChD 175 at 177. Cf *Carron Iron Co v Maclaren* (1855) 5 HL Cas 416 at 457-458.

4 *Re Achillopoulos, Johnson v Mavromichali* [1928] Ch 433 at 445. Cf *Re Holden, Isaacson v Holden* [1935] WN 52. As to the distinction between principal and ancillary administration see para 432 note 2 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(1) ADMINISTRATION OF ESTATES/(ii) Position of English Personal Representatives/438. Distribution and remission of net assets.

438. Distribution and remission of net assets.

Where the principal administration of a deceased person's estate is in England, the English personal representative will normally carry out the distribution to beneficiaries of the deceased's net assets¹. Where the English administration is ancillary, he is not bound to remit the net assets for this purpose to the principal administrator². If it thinks fit³ the court may authorise him to do so⁴, but it may instead direct him to carry out the distribution himself⁵.

An English personal representative acting as attorney for the principal administrator will normally be justified in making a remission of the net assets to the principal administrator⁶, or, in appropriate circumstances, to a third person upon the former's instructions⁷; but he ought not to make such a remission without first seeking the court's directions if it appears that the remission might alter the ultimate destination of the assets, as where the principal administrator would use them to pay debts which by English domestic law are statute-barred⁸ or would distribute them in accordance with a will which by English conflict rules has been revoked⁹. In such a case the court has a discretionary power to restrain him from making the remission¹⁰.

1 This will be done in accordance with rules of succession. For the rules of succession of English domestic law see the Administration of Estates Act 1925; and generally, EXECUTORS AND ADMINISTRATORS. For the English choice of law rules for succession see paras 443-464 post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. For the meaning of 'English domestic law' see para 2 note 3 ante.

2 *Re Manifold, Slater v Chryssaffinis* [1962] Ch 1 at 12, [1961] 1 All ER 710 at 715-716. As to the distinction between principal and ancillary administration see para 432 note 2 ante.

3 *Ewing v Orr Ewing* (1885) 10 App Cas 453 at 514, HL.

4 *Preston v Melville* (1841) 8 Cl & Fin 1 at 14-15; *Eames v Hacon* (1881) 18 ChD 347, CA; *Re Achilopoulos, Johnson v Mavromichali* [1928] Ch 433.

5 *Enohin v Wylie* (1862) 10 HL Cas 1 at 19, 24; *Re Lorillard, Griffiths v Catforth* [1922] 2 Ch 638, CA; *Re Manifold, Slater v Chryssaffinis* [1962] Ch 1, [1961] 1 All ER 710.

6 *Eames v Hacon* (1881) 18 ChD 347, CA; *Re Achilopoulos, Johnson v Mavromichali* [1928] Ch 433; *Re Manifold, Slater v Chryssaffinis* [1962] Ch 1, [1961] 1 All ER 710; *Re Weiss's Estate* [1962] P 136 at 144, [1962] 1 All ER 308 at 312.

7 *Re Weiss's Estate* [1962] P 136, [1962] 1 All ER 308. Payment to such a third person will be proper only if he has no notice of any limitation upon his principal's power so to instruct him and has no reason to believe that the effect of compliance with those instructions will be to deprive creditors or beneficiaries of their respective entitlements or otherwise to cause loss to the estate; otherwise he should seek the court's directions: *Re Weiss's Estate* supra at 144-145 and 313.

8 *Re Lorillard, Griffiths v Catforth* [1922] 2 Ch 638, CA.

9 *Re Manifold, Slater v Chryssaffinis* [1962] Ch 1, [1961] 1 All ER 710.

10 *Re Lorillard, Griffiths v Catforth* [1922] 2 Ch 638, CA; *Re Manifold, Slater v Chryssaffinis* [1962] Ch 1, [1961] 1 All ER 710; *Re Weiss's Estate* [1962] P 136 at 143-144, [1962] 1 All ER 308 at 312-313.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(1) ADMINISTRATION OF ESTATES/(iii) Position of Foreign Personal Representatives/439. Actions by foreign personal representatives.

(iii) Position of Foreign Personal Representatives

439. Actions by foreign personal representatives.

As in general an English grant of representation is necessary to enable a personal representative to make title to and administer the property of a deceased person in England, a foreign personal representative cannot sue in England in his capacity as such¹; although he can sue in his personal capacity, as where he has obtained a judgment against a debtor of the estate in the foreign country². He can also enforce his title under the *lex situs* to assets of the deceased which he has reduced into his possession, even if the assets have later been brought to England³.

1 *Carter and Crost's Case* (1585) Godb 33; *Tourton v Flower* (1735) 3 P Wms 369; *Whyte v Rose* (1842) 3 QB 493 at 507-508, Ex Ch; *Eames v Hacon* (1881) 18 ChD 347 at 353-354, CA; *Finnegan v Cementation Co Ltd* [1953] 1 QB 688, [1953] 1 All ER 1130, CA. This is subject to a statutory exception in the case of the recovery of money payable in England in respect of a life insurance policy effected by a person who died domiciled outside the United Kingdom: see the Revenue Act 1884 s 11 (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 191. See also *Haas v Atlas Assurance Co Ltd* [1913] 2 KB 209; *Re Loir's Policies* [1916] WN 87. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Vanquelin v Bouard* (1863) 15 CBNS 341; *Re Macnichol, Macnichol v Macnichol* (1874) LR 19 Eq 81.

3 *Currie v Bircham* (1822) 1 Dow & Ry KB 35; *Vanquelin v Bouard* (1863) 15 CBNS 341; *Re Macnichol, Macnichol v Macnichol* (1874) LR 19 Eq 81. It is an open question whether the foreign personal representative's title under the *lex situs* would be recognised where there has been no reduction into possession: *Whyte v Rose* (1842) 3 QB 493 at 506, Ex Ch. See also Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1014; and para 435 ante. As to the *lex situs* see para 380 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(1) ADMINISTRATION OF ESTATES/(iii) Position of Foreign Personal Representatives/440. Actions against foreign personal representatives.

440. Actions against foreign personal representatives.

A foreign personal representative cannot be made liable in England for acts done or assets received by him by virtue of his authority as foreign personal representative¹. As in general only executors or administrators acting under the authority of English law may administer a deceased's assets situated in England², a foreign personal representative who is not an executor or administrator under English law will be liable as an executor de son tort³ if he intermeddles with the assets of the deceased in England⁴.

1 *Degazon v Barclays Bank International* [1988] 1 FTLR 17, CA. See para 432 ante. This is subject to an exception in the case of administration actions: see para 434 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See para 439 ante.

3 As to liability as an executor de son tort see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 53 et seq.

4 *New York Breweries Co Ltd v A-G* [1899] AC 62, HL; *IRC v Stype Investments (Jersey) Ltd, Re Clore* [1982] Ch 456, CA.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(i) Jurisdiction/441. Jurisdiction of the English court.

(2) BENEFICIAL DISTRIBUTION

(i) Jurisdiction

441. Jurisdiction of the English court.

The English¹ court has jurisdiction to determine any question with regard to the succession² to a deceased person's estate, irrespective of his domicile, wherever it has exercised jurisdiction to make a grant of representation³. The jurisdiction extends to all the deceased's movables and immovables, wherever situated⁴. The court will not, however, make any order with regard to the beneficial distribution of the estate unless there is before the court some person recognised by it as authorised to deal with the property in question⁵.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 I.e. the beneficial distribution of the net estate, after payment of all debts, duties and expenses. Questions of administration must be distinguished: see para 433 ante.

3 *Bremer v Freeman* (1857) 10 Moo PCC 306; *Enohin v Wylie* (1862) 10 HL Cas 1; *Dogliani v Crispin* (1866) LR 1 HL 301; *Ewing v Orr Ewing* (1883) 9 App Cas 34, HL (subsequent proceedings (1885) 10 App Cas 453, HL); *Re Trufort*, *Trafford v Blanc* (1887) 36 ChD 600; *Re Bonnefoi*, *Surrey v Perrin* [1912] P 233, CA; *Re Ross*, *Ross v Waterfield* [1930] 1 Ch 377. Cf *Stirling-Maxwell v Cartwright* (1879) 11 ChD 522, CA. It also has jurisdiction wherever it has resealed a grant made in a country to which the Colonial Probates Act 1892 has been applied or has treated a Scottish confirmation or Northern Irish grant of representation as an English grant pursuant to the Administration of Estates Act 1971 s 1: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 238 et seq. As to grants of representation generally see para 432 note 3 ante.

4 For cases concerning domicile abroad and movables abroad see the cases cited in note 3 supra. For cases involving domicile in England and movables abroad see *Hope v Carnegie* (1866) 1 Ch App 320; *Re Duke of Wellington*, *Glentanar v Wellington* [1948] Ch 118, [1947] 2 All ER 854 at 864, CA. For cases involving domicile abroad and immovables abroad see *Ewing v Orr Ewing* (1883) 9 App Cas 34, HL (subsequent proceedings (1885) 10 App Cas 453, HL); *Re Ross*, *Ross v Waterfield* [1930] 1 Ch 377. For cases involving domicile in England and immovables abroad see *Hope v Carnegie* supra; *Re Piercy*, *Whitwham v Piercy* [1895] 1 Ch 83; *Re Moses*, *Moses v Valentine* [1908] 2 Ch 235; *Re Hoyles*, *Row v Jagg* [1911] 1 Ch 179, CA; *Re Duke of Wellington*, *Glentanar v Wellington* supra. Cf *Re Stirling*, *Stirling v Stirling* [1908] 2 Ch 344; *Jubert v Church Comrs for England* 1952 SC 160. For the distinction between movables and immovables see paras 380-384 ante.

5 A foreign grant of representation is not sufficient (except in the case of a Scottish confirmation or Northern Irish grant of representation): *A-G v Hope* (1834) 1 Cr M & R 530 at 540, 562-564, HL; *Enohin v Wylie* (1862) 10 HL Cas 1 at 14, 19; *Vanquelin v Bouard* (1863) 15 CBNS 341; *Ewing v Orr Ewing* (1883) 9 App Cas 34 at 38-39, 46, HL. Cf *Re Lorillard*, *Griffiths v Catforth* [1922] 2 Ch 638, CA; CPR 64.4(1); and see paras 439-440 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(i) Jurisdiction/442. Jurisdiction of foreign courts.

442. Jurisdiction of foreign courts.

The English¹ court will follow the decision of the court of the domicile of the deceased at the date of his death upon any question with regard to the succession to his movables, wherever situated². It will follow the decision of the court of the country where his immovables are situated upon any question with regard to the succession to those immovables³.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Larpent v Sindry* (1828) 1 Hag Ecc 382; *Moore v Budd* (1832) 4 Hag Ecc 346; *Enohin v Wylie* (1862) 10 HL Cas 1; *Re Cosnahan's Goods* (1866) LR 1 P & D 183; *Doglioni v Crispin* (1866) LR 1 HL 301; *Re Smith's Goods* (1868) 16 WR 1130; *Miller v James* (1872) LR 3 P & D 4; *Ewing v Orr Ewing* (1883) 9 App Cas 34, HL (subsequent proceedings (1885) 10 App Cas 453, HL); *Re Trufort, Trafford v Blanc* (1887) 36 ChD 600; *Re Yahuda's Estate* [1956] P 388, [1956] 2 All ER 262. It is otherwise if the foreign decision is contrary to English public policy: *Re Askew, Marjoribanks v Askew* [1930] 2 Ch 259 at 275.

3 This follows from the principle that the English court will recognise a judgment in rem given by the court of a foreign country with regard to immovable property situated within that country: see para 164 ante. Cf *Re Trepsa Mines Ltd* [1960] 3 All ER 304n, [1960] 1 WLR 1273, CA.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/A. IN GENERAL/443. The law governing succession.

(ii) Choice of Law

A. IN GENERAL

443. The law governing succession.

Subject to certain exceptions¹, the succession to the movables of a deceased person is governed by the law of his domicile at the date of his death². Again subject to certain exceptions³, the succession to his immovables is governed by the *lex situs*⁴.

1 See paras 449 note 2, 451, 453, 458-459, 461-464 post.

2 For general statements of this rule see *Pipon v Pipon* (1744) Amb 25 at 27; *Somerville v Lord Somerville* (1801) 5 Ves 750 at 786; *Re Ewin* (1830) 1 Cr & J 151 at 156; *De Bonneval v De Bonneval* (1838) 1 Curt 856 at 858-859; *Preston v Melville* (1841) 8 Cl & Fin 1 at 12, HL; *Bremer v Freeman* (1857) 10 Moo PCC 306 at 359; *Whicker v Hume* (1858) 7 HL Cas 124 at 165; *Enohin v Wylie* (1862) 10 HL Cas 1 at 13, 19; *Doglioni v Crispin* (1866) LR 1 HL 301 at 314; *Ewing v Orr Ewing* (1883) 9 App Cas 34 at 39, HL (subsequent proceedings (1885) 10 App Cas 453 at 502, HL); *Re Trufort, Trafford v Blanc* (1887) 36 ChD 600 at 610-611; *Duncan v Lawson* (1889) 41 ChD 394 at 397; *Re Barnett's Trusts* [1902] 1 Ch 847 at 855-856; *Re Bonnefoi, Surrey v Perrin* [1912] P 233 at 237, CA; *Re Berchtold, Berchtold v Capron* [1923] 1 Ch 192 at 199; *Re Ross, Ross v Waterfield* [1930] 1 Ch 377 at 387; *Re Duke of Wellington, Glentanar v Wellington* [1947] Ch 506 at 513, [1947] 2 All ER 854 at 857 (affd [1948] Ch 118, [1947] 2 All ER 854 at 864, CA); *Re Maldonado, State of Spain v Treasury Solicitor* [1954] P 223 at 226, [1953] 2 All ER 300 at 302 (affd [1954] P 223 at 245-246, 250, [1953] 2 All ER 1579 at 1584, 1586, CA); *Philipson-Stow v IRC* [1961] AC 727 at 748, 761-762, [1960] 3 All ER 814 at 822, 830-831, HL; *Re Collens, Royal Bank of Canada (London) Ltd v Krogh* [1986] Ch 505 at 509, [1986] 1 All ER 611 at 613-614. As to succession by and to legitimated and adopted persons see paras 342, 348 ante.

3 See paras 451, 453, 458, 461-462 post.

4 *Brodie v Barry* (1813) 2 Ves & B 127 at 131; *Duncan v Lawson* (1889) 41 ChD 394 at 397; *Pepin v Bruyère* [1902] 1 Ch 24 at 26, CA; *Re Miller, Bailie v Miller* [1914] 1 Ch 511 at 519; *Re Berchtold, Berchtold v Capron* [1923] 1 Ch 192 at 199; *Re Ross, Ross v Waterfield* [1930] 1 Ch 377 at 404-405; *Re Duke of Wellington, Glentanar v Wellington* [1947] Ch 506 at 513, [1947] 2 All ER 854 at 857-858 (affd [1948] Ch 118, [1947] 2 All ER 854 at 864, CA); *Philipson-Stow v IRC* [1961] AC 727 at 744, 748, 761-762, [1960] 3 All ER 814 at 820, 822-823, 830-831, HL. As to the *lex situs* generally see para 380 ante. As to the *lex situs* as it relates to foreign immovables see para 399 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/A. IN GENERAL/444. Renvoi.

444. Renvoi.

The English¹ court generally² applies the doctrine of total renvoi to questions of succession³. Thus in arriving at a decision it considers itself to be a court sitting in the country where the deceased was domiciled at the date of his death or the property is situated, as the case may be, and it decides the question as such a court would have decided it⁴.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 In innumerable succession cases the English court has applied the domestic rules of the foreign law without any reference to its conflict rules, but these can mostly be explained by the fact that no one was concerned to argue that renvoi applied: see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 73. Renvoi is excluded from many cases falling within the Wills Act 1963, and presumably it does not apply to the construction of wills, which depends on the law intended by the testator: see paras 451, 453, 462 post. As to renvoi generally see paras 6-10 ante.

3 See the cases cited in note 4 infra. As to the doctrine of total renvoi see para 7 ante.

4 For reference to conflict rules of the law of the domicile see *Collier v Rivaz* (1841) 2 Curt 855; *Frere v Frere* (1847) 5 Notes of Cases 593; *Re Trufort*, *Trafford v Blanc* (1887) 36 ChD 600; *Re Brown-Séquard* (1894) 70 LT 811; *Re Johnson, Roberts v A-G* [1903] 1 Ch 821 (disapproved on another point in *Casdagli v Casdagli* [1918] P 89, CA; on appeal [1919] AC 145, HL); *Re Annesley*, *Davidson v Annesley* [1926] Ch 692; *Re Ross*, *Ross v Waterfield* [1930] 1 Ch 377; *Re O'Keefe*, *Poingdestre v Sherman* [1940] Ch 124, [1940] 1 All ER 216; *Re Fuld's Estate (No 3)*, *Hartley v Fuld* [1968] P 675, [1965] 3 All ER 776. Cf *Enohin v Wylie* (1862) 10 HL Cas 1; *Abd-ul-Messih v Farra* (1888) 13 App Cas 431 at 444-445, PC. For reference to conflict rules of the law of the place where the immovable is situated see *Re Ross*, *Ross v Waterfield* supra; *Re Duke of Wellington*, *Glentanar v Wellington* [1947] Ch 506, [1947] 2 All ER 854 (on appeal [1948] Ch 118, [1947] 2 All ER 854 at 864, CA). For reference to conflict rules of the law of the place where the will is made see *Re Lacroix's Goods* (1877) 2 PD 94 (decided under the Wills Act 1861 (now repealed)).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/A. IN GENERAL/445. The time factor.

445. The time factor.

In the case of succession to movables the English¹ court generally disregards changes in the law of the domicile, whether or not retrospective, made after the death of the deceased². These changes are taken into account, however, in the case of succession to immovables³.

In determining for the purposes of the Wills Act 1963⁴ whether a will complied with the formal requirements of a particular law, in the case of succession both to movables and immovables, the court must have regard to the law as it was at the time of execution of the will, but not so as to prevent account being taken of a retrospective alteration in the law, provided that this validates the will⁵.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Lynch v Paraguay Provisional Government* (1871) LR 2 P & D 268; followed in *Re Aganoor's Trusts* (1895) 64 LJCh 521; applied in *Re Marshall, Barclays Bank Ltd v Marshall* [1957] Ch 507, [1957] 3 All ER 172, CA; approved in *Adams v National Bank of Greece SA* [1961] AC 255, [1960] 2 All ER 421, HL; criticised by Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 57-59. Cf para 210 ante.

3 *Earl Nelson v Lord Bridport* (1845) 8 Beav 547.

4 As to the Wills Act 1963 see para 451 post.

5 *Ibid* s 6(3). For the meaning of 'will' for the purposes of the Wills Act 1963 see para 451 note 2 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/A. IN GENERAL/446. Effect of grant of representation.

446. Effect of grant of representation.

So long as a grant of letters of administration by the English¹ court remains unrevoked, it is conclusive evidence that the deceased died intestate, having left no effective will². So long as a grant of probate by the English court remains unrevoked, it is conclusive evidence that the instrument proved is the last will of the testator³. It is conclusive as to the testator's capacity and as to the formal validity of the will⁴, but it is not conclusive as to the testator's domicile⁵ or as to the material or essential validity⁶ or construction⁷ of the will⁸.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Tourton v Flower* (1735) 3 P Wms 369.

3 *Thornton v Curling* (1824) 8 Sim 310; *Whicker v Hume* (1858) 7 HL Cas 124.

4 *Thornton v Curling* (1824) 8 Sim 310; *Whicker v Hume* (1858) 7 HL Cas 124.

5 *Bradford v Young* (1884) 26 ChD 656 (on appeal (1885) 29 ChD 617, CA); *Concha v Concha* (1886) 11 App Cas 541, HL.

6 *Thornton v Curling* (1824) 8 Sim 310; *Whicker v Hume* (1858) 7 HL Cas 124; *Concha v Concha* (1886) 11 App Cas 541 at 554-555, 572, HL; *Pouey v Hordern* [1900] 1 Ch 492.

7 *Bradford v Young* (1884) 26 ChD 656 (on appeal (1885) 29 ChD 617, CA); *Concha v Concha* (1886) 11 App Cas 541 at 562, HL.

8 The principle is one of English domestic law: see eg *Re Barrance, Barrance v Ellis* [1910] 2 Ch 419. See further EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 65.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/B. INTESTATE SUCCESSION/447. Intestate succession to movables.

B. INTESTATE SUCCESSION

447. Intestate succession to movables.

The succession to an intestate's movables, wherever situated, is governed by the law of his domicile at the date of his death¹. This law has been applied to all questions of succession², including the distribution of the deceased's intangible movables³, the applicability of the doctrine of election⁴, the entitlement to a proportion of the estate of his widow⁵ and illegitimate children⁶, and the ascertainment of his next of kin⁷.

If the movables pass to a foreign state by way of a right of succession under the law of the domicile, by which the state claims as the deceased's *ultimus heres*⁸, the English court will recognise and give effect to this right⁹. However, if the state claims the property as *bona vacantia* or under a *jus regale*¹⁰, the claim is not governed by the law of the domicile, for it has nothing to do with the rules governing succession¹¹. Accordingly, where there is no one who is entitled by the law of the domicile to take the deceased's movables in England by way of succession, the Crown has an absolute right to take them¹².

1 *Pipon v Pipon* (1744) Amb 25; *Thorne v Watkins* (1750) 2 Ves Sen 35; *Bruce v Bruce* (1790) 6 Bro Parl Cas 566, HL; *Hog v Lashley* (1792) 6 Bro Parl Cas 577, HL; *Balfour v Scott* (1793) 6 Bro Parl Cas 550, HL; *Bempde v Johnstone* (1796) 3 Ves 198; *Somerville v Lord Somerville* (1801) 5 Ves 750; *Re Ewin* (1830) 1 Cr & J 151 at 156; *De Bonneval v De Bonneval* (1838) 1 Curt 856 at 858; *Craigie v Lewin* (1843) 3 Curt 435 at 450; *Enohin v Wylie* (1862) 10 HL Cas 1; *Doglioni v Crispin* (1866) LR 1 HL 301; *Blackwood v R* (1882) 8 App Cas 82, PC; *Re Trufort, Trafford v Blanc* (1887) 36 ChD 600 at 609-611; *Abd-ul-Messih v Farra* (1888) 13 App Cas 431 at 438, PC; *Duncan v Lawson* (1889) 41 ChD 394 at 397; *Re Barnett's Trusts* [1902] 1 Ch 847; *Re O'Keefe, Poingdestre v Sherman* [1940] Ch 124, [1940] 1 All ER 216; *Re Maldonado, State of Spain v Treasury Solicitor* [1954] P 223 at 233, [1953] 2 All ER 1579, CA.

2 See the cases cited in note 1 supra.

3 *Pipon v Pipon* (1744) Amb 25; *Thorne v Watkins* (1750) 2 Ves Sen 35.

4 *Balfour v Scott* (1793) 6 Bro Parl Cas 550, HL.

5 *Re Rea, Rea v Rea* [1902] 1 IR 451; *Re Collens, Royal Bank of Canada (London) Ltd v Krogh* [1986] Ch 505, [1986] 1 All ER 611.

6 *Doglioni v Crispin* (1866) LR 1 HL 301.

7 *Bruce v Bruce* (1790) 6 Bro Parl Cas 566, HL; *Bempde v Johnstone* (1796) 3 Ves 198; *Somerville v Lord Somerville* (1801) 5 Ves 750; *Enohin v Wylie* (1862) 10 HL Cas 1; *Re O'Keefe, Poingdestre v Sherman* [1940] Ch 124, [1940] 1 All ER 216.

8 I.e. the ultimate heir of the deceased.

9 *Re Maldonado, State of Spain v Treasury Solicitor* [1954] P 223 at 233, [1953] 2 All ER 1579, CA. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

10 I.e. a royal title. As to *bona vacantia* see CROWN PROPERTY vol 12(1) (Reissue) para 235 et seq.

11 *Re Barnett's Trusts* [1902] 1 Ch 847; *Re Musurus's Estate* [1936] 2 All ER 1666.

12 *Re Barnett's Trusts* [1902] 1 Ch 847; *Re Musurus's Estate* [1936] 2 All ER 1666. See also the Administration of Estates Act 1925 s 46(1)(vi); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 613.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/B. INTESTATE SUCCESSION/448. Intestate succession to immovables.

448. Intestate succession to immovables.

All questions of succession to an intestate's immovables are governed by the *lex situs*¹.

¹ *Balfour v Scott* (1793) 6 Bro Parl Cas 550, HL; *Drummond v Drummond* (1799) 6 Bro Parl Cas 601, HL; *Brodie v Barry* (1813) 2 Ves & B 127; *Dundas v Dundas* (1830) 2 Dow & Cl 349, HL; *Doe d Birtwhistle v Vardill* (1835) 2 Cl & Fin 571, HL (subsequent proceedings, sub nom *Birtwhistle v Vardill* (1840) 7 Cl & Fin 895, HL); *Freke v Lord Carbery* (1873) LR 16 Eq 461; *Re Gentili's Goods* (1875) IR 9 Eq 541; *De Fogassieras v Duport* (1881) 11 LR Ir 123; *Duncan v Lawson* (1889) 41 ChD 394; *Re Rea, Rea v Rea* [1902] 1 IR 451; *Pepin v Bruyère* [1902] 1 Ch 24, CA; *Re Berchtold, Berchtold v Capron* [1923] 1 Ch 192; *Re Cutcliffe's Will Trusts, Brewer v Cutcliffe* [1940] Ch 565, [1940] 2 All ER 297; *Re Collens, Royal Bank of Canada (London) Ltd v Krogh* [1986] Ch 505, [1986] 1 All ER 611. As to the *lex situs* generally see para 380 ante. As to the *lex situs* as it relates to foreign immovables see para 399 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/C. TESTATE SUCCESSION/449. Capacity.

C. TESTATE SUCCESSION

449. Capacity.

The personal capacity of a testator to make a will¹ of movables is governed by the law of his domicile². No distinction is drawn for this purpose between lack of capacity due to immaturity or status and incapacity arising from ill health³.

A beneficiary under a will has capacity to receive a legacy if he has capacity either by the law of his domicile or by the law of the testator's domicile⁴.

The lex situs governs capacity both to make a will of immovables and to take under such a will⁵.

1 This is a different question from the question of proprietary incapacity, in which the incapacity generally arises from the nature of the bequest or devise, and which is best regarded as a question of material or essential validity: see para 456 post. The question of personal capacity concerns restrictions which attach to the person rather than the property of the testator, eg physical and mental capacity, capacity of minors and married women. As to wills generally see WILLS.

2 *Re Maraver's Goods* (1828) 1 Hag Ecc 498; *Re Gutierrez's Goods* (1869) 38 LJP & M 48; *Re Fuld's Estate (No 3)*, *Hartley v Fuld* [1968] P 675 at 696, [1965] 3 All ER 776 at 780. It is uncertain whether, where there has been a change of domicile after execution, the domicile at the date of execution or at the date of death governs. The decision in *Re Lewal's Settlement Trusts*, *Gould v Lewal* [1918] 2 Ch 391 (a case on the exercise of a power of appointment by will) seems to support the former, but only to a very limited degree, as it was not a case of a change of domicile. See further Cheshire and North *Private International Law* (13th Edn 1999) pp 838-839; Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1029-1030.

3 *Re Fuld's Estate (No 3)*, *Hartley v Fuld* [1968] P 675 at 696, [1965] 3 All ER 776 at 780. While the question of undue influence is part of the substantive law of wills and is governed by the law of the domicile, the English rule of knowledge and approval is evidentiary and applicable in an English court as part of the lex fori: *Re Fuld's Estate (No 3)*, *Hartley v Fuld* supra at 697-698 and 781. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 *Re Hellmann's Will* (1866) LR 2 Eq 363. Cf *Leslie v Baillie* (1843) 2 Y & C Ch Cas 91; *Donohoe v Donohoe* (1887) 19 LR Ir 349; *Re Schnapper* [1928] Ch 420.

5 *Philipson-Stow v IRC* [1961] AC 727 at 743, [1960] 3 All ER 814 at 819, HL. See also *Bank of Africa Ltd v Cohen* [1909] 2 Ch 129, CA (a case on capacity to transfer immovables inter vivos). As to the lex situs generally see para 380 ante. As to the lex situs as it relates to foreign immovables see para 399 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/C. TESTATE SUCCESSION/450. Formal validity at common law.

450. Formal validity at common law.

A will of movables is valid in point of form at common law¹ if its execution complied with the formalities prescribed by the law of the testator's domicile at the date of his death². Compliance with either the internal law of the domicile or the internal law of any system of law referred to by the conflict rules of the law of the domicile is sufficient³. In determining whether a document is a valid testamentary disposition the court will have regard to the law of only one country at a time⁴.

A will of immovables is valid in point of form at common law if its execution complied with the formal requirements of the *lex situs*⁵. Compliance with any system of law referred to by the *lex situs* is probably sufficient⁶.

1 The common law rules regarding the formal validity of wills have survived the Wills Act 1963, which came into force on 1 January 1964. The Act repealed the Wills Act 1861 (see the Wills Act 1963 s 7(3)), and gave effect to the Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions (Hague, 5 October 1961; TS 5 (1964); Cmnd 2250), but did not abolish the common law rules. Renvoi is applicable under the common law rules, but not under the Wills Act 1963: see paras 444 ante, 451 post. As to renvoi see paras 6-10 ante. As to wills generally see WILLS.

2 *Bremer v Freeman* (1857) 10 Moo PCC 306; *Hare v Nasmyth* (1823) 2 Add 25, HL; *Stanley v Bernes* (1830) 3 Hag Ecc 373; *De Bonneval v De Bonneval* (1838) 1 Curt 856; *Collier v Rivaz* (1841) 2 Curt 855; *Craigie v Lewin* (1843) 3 Curt 435; *Maltass v Maltass* (1844) 1 Rob Eccl 67; *Croker v Marquis of Hertford* (1844) 4 Moo PCC 339; *Frere v Frere* (1847) 5 Notes of Cases 593; *Whicker v Hume* (1858) 7 HL Cas 124; *Crookenden v Fuller* (1859) 29 LJP & M 1 (corrected on another point in *Re Alexander's Goods* (1860) 29 LJPM & A 93); *Laneuville v Anderson* (1860) 2 Sw & Tr 24; *De Fogassieras v Duport* (1881) 11 LR Ir 123; *Abd-ul-Messih v Farra* (1888) 13 App Cas 431, PC; *Re Martin, Loustalan v Loustalan* [1900] P 211, CA; *Re Manifold, Slater v Chryssaffinis* [1962] Ch 1, [1961] 1 All ER 710.

3 *Collier v Rivaz* (1841) 2 Curt 855; *Maltass v Maltass* (1844) 1 Rob Eccl 67; *Frere v Frere* (1847) 5 Notes of Cases 593. Cf *Re Lacroix's Goods* (1877) 2 PD 94 (a decision under the Wills Act 1861 (repealed)). See also para 444 ante. It seems clear that the rule is one of alternative reference to the internal and conflict rules of the law of the domicile; both in *Collier v Rivaz* supra and in *Re Lacroix's Goods* supra it was necessary to have recourse both to the internal rules and the conflict rules of the foreign law in order to admit all the testamentary documents to probate; and there seems to be no case in which a will complying with the internal law of the law of the domicile has been held formally invalid for non-compliance with the formal requirements of a system of law referred to by its conflict rules. Cf *Re Manifold, Slater v Chryssaffinis* [1962] Ch 1 at 16, [1961] 1 All ER 710 at 718.

4 *Pechell v Hilderley* (1869) LR 1 P & D 673 (a decision under the Wills Act 1861 (repealed)), where a will, invalid by English and Italian law, was confirmed by codicil executed in accordance with Italian law but invalidated by that law as being annexed to an invalid will; it was held that the two laws could not be combined to validate the codicil or the will by construing the codicil as a valid English codicil validating the invalid will by republication. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

5 *Coppin v Coppin* (1725) 2 P Wms 291; *Re Gentili's Goods* (1875) IR 9 Eq 541; *De Fogassieras v Duport* (1881) 11 LR Ir 123; *Pepin v Bruyère* [1902] 1 Ch 24, CA; *Philipson-Stow v IRC* [1961] AC 727 at 743, [1960] 3 All ER 814 at 819, HL. As to the *lex situs* generally see para 380 ante. As to the *lex situs* as it relates to foreign immovables see para 399 ante.

6 This follows from the general application of renvoi in all cases governed by the *lex situs*: see *Bank of Africa Ltd v Cohen* [1909] 2 Ch 129 at 146-147, CA; and paras 10, 399, 444 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/C. TESTATE SUCCESSION/451. Formal validity under the Wills Act 1963.

451. Formal validity under the Wills Act 1963.

By virtue of the Wills Act 1963¹, a will² of movables or immovables will be treated as properly executed if its execution conformed to any of the following laws:

- 434 (1) the internal law³ in force in the territory where it was executed; or
- 435 (2) the internal law in force in the territory where, at the time of its execution or of the testator's death, he was domiciled or had his habitual residence⁴; or
- 436 (3) the internal law³ in force in a state of which, either at the time of its execution or of the testator's death, he was a national⁵.

Without prejudice to the above, a will so far as it disposes of immovable property will be treated as properly executed if its execution conformed to the internal law in force in the territory where the property was situated⁶; and a will executed on board a vessel⁷ or aircraft, will be treated as properly executed if the execution of the will conformed with the internal law in force in the territory with which the vessel or aircraft may be taken to have been most closely connected, having regard to its registration (if any) and other relevant circumstances⁸.

1 The Wills Act 1963, which repeals the Wills Act 1861 (Lord Kingsdown's Act), applies to the will of a testator dying on or after 1 January 1964, whenever the will was made, although the repeal of the Wills Act 1861 does not invalidate a will made before 1 January 1964: Wills Act 1963 s 7(3), (4). Under the Wills Act 1861, a will of personalty made outside the United Kingdom by a holder of British nationality was valid in point of form if made in accordance with the forms required either by the law of the place of execution, or by the law of the testator's domicile at the date of execution, or by the law then in force in that part of the British dominions where he had his domicile of origin: Wills Act 1861 s 1 (repealed). A will of personalty made within the United Kingdom by a holder of British nationality was valid in point of form if made in accordance with the forms required by the law of the place of execution: s 2 (repealed). The Wills Act 1963 extends to Northern Ireland: s 7(5) (amended by the Northern Ireland Constitution Act 1973 s 41(1), Sch 6 Pt I). As to wills generally see WILLS. As to British nationality see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM. As to British dominions see COMMONWEALTH. For the meaning of 'United Kingdom' see para 4 ante.

2 'Will' includes any testamentary instrument or act; and 'testator' must be construed accordingly: Wills Act 1963 s 6(1). There is no requirement that each such instrument should conform to the same law. However, the principle of *Pechell v Hilderley* (1869) LR 1 P & D 673 (see para 450 note 4 ante) would still seem to apply.

3 'Internal law', in relation to any territory or state, means the law which would apply in a case where no question of the law in force in any other territory or state arose; and 'state' means a territory or group of territories having its own law of nationality: Wills Act 1963 s 6(1). The Act thus excludes renvoi from cases falling within its ambit. As to renvoi generally see paras 6-10 ante.

4 As to habitual residence see paras 59-61 ante.

5 Wills Act 1963 s 1; *Re Kanani, Engledow v Davidson* (1978) 122 Sol Jo 611. Where there are two or more systems of internal law relating to formal validity of wills, the system to be applied is the one indicated by any rule in force throughout the territory or state: Wills Act 1963 s 6(2)(a). If there is no such rule, it is the system with which the testator was most closely connected at the relevant time, namely the date of his death where the matter is to be determined by circumstances prevailing at his death, and the time of execution of the will in any other case: s 6(2)(b).

6 Ibid s 2(1)(b). For the additional rules under the Wills Act 1963 for the revocation of wills and the exercise of powers of appointment see paras 458, 461 post.

7 References to vessels in the Wills Act 1963 or activities or places connected with them are extended to include hovercraft or activities or places connected with hovercraft: see the Hovercraft (Application of Enactments) Order 1972, SI 1972/971, art 4, Sch 1 Pt A.

8 Wills Act 1963 s 2(1)(a).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/C. TESTATE SUCCESSION/452. Characterisation of special formal requirements.

452. Characterisation of special formal requirements.

Where a law in force outside the United Kingdom¹ falls to be applied in relation to a will², any requirement of that law whereby special formalities are to be observed by testators³ answering a particular description, or witnesses to the execution of a will are to possess certain qualifications, is treated, notwithstanding any rule of that law to the contrary, as a formal requirement only⁴.

1 For the meaning of 'United Kingdom' see para 4 ante.

2 For the meaning of 'will' see para 451 note 2 ante. As to wills generally see WILLS.

3 For the meaning of 'testator' see para 451 note 2 ante.

4 Wills Act 1963 s 3. This provision operates irrespective of whether the application of the foreign law is in pursuance of the Wills Act 1963: s 3.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/C. TESTATE SUCCESSION/453. Construction.

453. Construction.

The construction of a will¹ is governed by the law intended by the testator². In the case of a will of movables, this is presumed to be the law of the testator's domicile at the date of execution of the will³, but this presumption is rebutted by any sufficient indication that the testator intended his will to be construed according to the law of another country⁴. The testator's intention may be expressed in the will⁵, or it may be implied from circumstances such as his use of a particular language⁶, or of expressions known only to a particular law⁷.

Prima facie, a will of immovables must be construed according to the law of the testator's domicile at the date of execution of the will⁸, but this presumption may be rebutted by any sufficient indication that the testator intended to refer to some other law⁹, as where he uses the technical language of the country where the immovables are situated¹⁰. When construing a will of immovables in accordance with the law of the testator's domicile, the court will construe it so as to enable its dispositions to operate to the fullest extent that they are allowed to do so by the *lex situs*¹¹.

Under the Wills Act 1963, the construction of a will¹² of movables or immovables cannot be altered by reason of any change in the testator's¹³ domicile after the execution of the will¹⁴.

1 le all questions concerning the meaning and interpretation of the will. The question of construction must be distinguished from the question of status: *Re Fergusson's Will* [1902] 1 Ch 483 at 487 (meaning of gift to 'next of kin' a matter of construction; legitimacy of those entitled a matter of status). It must also be distinguished from the question of material or essential validity (see para 456 post); the former determines the testator's intention, while the latter determines the effect to be given to that intention: see *Baring v Ashburton* (1886) 54 LT 463 (construction governed by the law of the domicile; essential validity by the *lex situs*); *Philipson-Stow v IRC* [1961] AC 727 at 761, [1960] 3 All ER 814 at 830, HL. The question whether a legacy is given in satisfaction of a previous obligation is one of construction (*Campbell v Campbell* (1866) LR 1 Eq 383); so too is the question of applicability of the *cy-près* doctrine to a charitable bequest (*Re De Noailles, Clouston v Tufnell* (1916) 114 LT 1089); so too is the question of destination of lapsed legacies (*Anstruther v Chalmers* (1826) 2 Sim 1; *Re Cunningham, Healing v Webb* [1924] 1 Ch 68; cf *Yates v Thomson* (1835) 3 Cl & Fin 544 at 570, HL). As to construction of wills in English domestic law see WILLS vol 50 (2005 Reissue) para 476 et seq. For the meaning of 'English domestic law' see para 2 note 3 ante. As to wills generally see WILLS. As to the *cy-près* doctrine see CHARITIES vol 8 (2010) PARA 208 et seq; and as to charities generally see CHARITIES.

2 *Bradford v Young* (1885) 29 ChD 617 at 624, CA; *Philipson-Stow v IRC* [1961] AC 727 at 760-761, [1960] 3 All ER 814 at 830, HL. Cf *Enohin v Wylie* (1862) 10 HL Cas 1 at 24; *Di Sora v Phillippis* (1863) 10 HL Cas 624 (contract).

3 'A person's meaning can only be gathered from assuming that he intended to use words in the sense affixed to them by the law of the country he belonged to at the time of framing his instrument': *Yates v Thomson* (1835) 3 Cl & Fin 544 at 588, HL, per Lord Brougham; *Trotter v Trotter* (1828) 4 Bli NS 502, HL; *Bernal v Bernal* (1838) 3 My & Cr 559; *Enohin v Wylie* (1862) 10 HL Cas 1; *Ewing v Orr Ewing* (1883) 9 App Cas 34 at 43, HL; *Bradford v Young* (1885) 29 ChD 617, CA; *Re Cliff's Trusts* [1892] 2 Ch 229 at 232; *Re Fergusson's Will* [1902] 1 Ch 483; *Re Manners, Manners v Manners* [1923] 1 Ch 220; *Re Cunningham, Healing v Webb* [1924] 1 Ch 68; *Philipson-Stow v IRC* [1961] AC 727 at 761, [1960] 3 All ER 814 at 830, HL; *Re Sillar, Hurley v Wimbush and Bavington* [1956] IR 344.

4 *Bradford v Young* (1885) 29 ChD 617, CA; *Re Cunningham, Healing v Webb* [1924] 1 Ch 68. See also *Re Price, Tomlin v Latter* [1900] 1 Ch 442 at 452; *Re D'Este's Settlement Trusts, Poulter v D'Este* [1903] 1 Ch 898 at 905 (both cases on exercise by will of a power of appointment).

5 *Raphael v Boehm, Cockburn v Raphael* (1852) 22 LJCh 299 (express reference to the law of inheritance in Great Britain). Cf *Re Price, Tomlin v Latter* [1900] 1 Ch 442 (exercise by will of power of appointment).

6 However, the fact that the will is written in a language other than that of the domicile is not, of itself a sufficient indication that it should be construed according to the law of the country in whose language it is

written: *Reynolds v Kortright* (1854) 18 Beav 417 (English domicile, Spanish language); *Baring v Ashburton* (1886) 54 LT 463 (English domicile, French language); *Re Bonnefoi, Surrey v Perrin* [1912] P 233, CA (Italian domicile, English language); *Re Manners, Manners v Manners* [1923] 1 Ch 220 (English domicile, Spanish language). The fact that a will by a domiciled Frenchman was made in England in English form chiefly benefiting English legatees was held not to be a sufficient indication that the testator intended his will to be construed according to English law: *Re Cunningham, Healing v Webb* [1924] 1 Ch 68. See para 454 post. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

7 *Studd v Cook* (1883) 8 App Cas 577, HL (will of immovables). Cf *Re Cliff's Trusts* [1892] 2 Ch 229; *Trotter v Trotter* (1828) 4 Bli NS 502, HL. Contrast *Bradford v Young* (1885) 29 ChD 617, CA, where the presence of a few technical expressions was held to be insufficient indication of an intention that the will should be construed according to the law of the country to which the expressions belonged.

8 *Trotter v Trotter* (1828) 4 Bli NS 502, HL; *Maxwell v Maxwell* (1852) 2 De GM & G 705; *Studd v Cook* (1883) 8 App Cas 577, HL; *Bradford v Young* (1885) 29 ChD 617 at 623, CA; *Baring v Ashburton* (1886) 54 LT 463; *Philipson-Stow v IRC* [1961] AC 727 at 761, [1960] 3 All ER 814 at 830-831, HL.

9 *Yates v Thomson* (1835) 3 Cl & Fin 544 at 588, HL.

10 Cf *Bradford v Young* (1885) 29 ChD 617 at 623, CA. The effect may be that, in so far as a will disposes of both movables and immovables, it is to be construed according to two different laws.

11 *Studd v Cook* (1883) 8 App Cas 577 at 591, HL. Cf *Re Miller, Bailie v Miller* [1914] 1 Ch 511, where the question was one of essential validity rather than construction. As to the *lex situs* generally see para 380 ante. As to the *lex situs* as it relates to foreign immovables see para 399 ante.

12 For the meaning of 'will' for the purposes of the Wills Act 1963 see para 451 note 2 ante.

13 For the meaning of 'testator' for the purposes of the Wills Act 1963 see para 451 note 2 ante.

14 Wills Act 1963 s 4. Cf para 445 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/C. TESTATE SUCCESSION/454. Wills in foreign languages.

454. Wills in foreign languages.

Where probate has been granted of a foreign will or copy will, accompanied by an English translation, or of an English translation, accompanied by the original or copy will¹, the court may refer to the original or copy will for the purpose of deciding questions of construction². Where the will is to be construed according to English law³, the court will only look at the effect of the language in which it is written in order to ascertain what are the equivalent expressions in English⁴; and even where it is to be construed according to the law of the country in whose language it is written, the court will not refer to that law for the meaning of words which are not subject to any technical rules of construction under that law⁵.

1 As to probate of foreign wills and translations of such wills see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 118 et seq. As to wills generally see WILLS.

2 *Re Cliff's Trusts* [1892] 2 Ch 229 (correcting the report in *L'Fit v L'Batt* (1718) 1 P Wms 526); *Re Manners, Manners v Manners* [1923] 1 Ch 220.

3 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 *Reynolds v Kortright* (1854) 18 Beav 417 at 426. Cf *Baring v Ashburton* (1886) 54 LT 463.

5 *Bernal v Bernal* (1838) 3 My & Cr 559 at 580.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/C. TESTATE SUCCESSION/455. Certain English principles of construction.

455. Certain English principles of construction.

Where a will is construed according to English law¹, certain principles of construction govern gifts of debts, the currency of payment of legacies, and devises of estates of immovables.

Debts, other than specialty and judgment debts, are usually to be regarded as situated where the debtor is resident, so that a gift of all the testator's property in a particular country passes debts due from persons resident there².

Prima facie, a legacy is to be paid in the currency of the testator's domicile³, but where a currency is expressly indicated the legacy must be paid in that currency⁴, and where the testator makes a separate distribution of property in different countries, charging legacies on each, those legacies must be paid respectively in the currency of the country in which the property on which they are charged is situated⁵. Where the legacy is payable in the currency of a foreign country, its value must be computed according to the value of the currency in that country, irrespective of the rate of exchange, and without any deduction for the cost of remittance⁶; but where such a legacy is payable out of assets in England, its value must be computed according to the rate of exchange, and not according to the actual value in the foreign country itself⁷. The date for ascertaining the value of the legacy is the date on which it becomes due, that is, one year from the death of the testator⁸.

The lex situs normally determines what passes under a general devise of a foreign immovable estate, so that this law will decide whether the devise includes livestock or other movables necessary for the work of the estate⁹.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante. As to wills generally see WILLS.

2 *Nisbett v Murray* (1799) 5 Ves 149; *Earl of Tyrone v Marquis of Waterford* (1860) 1 De GF & J 613; *Guthrie v Walrond* (1883) 22 ChD 573; *Re Clark, McKechnie v Clark* [1904] 1 Ch 294. As to the locality of a debt see further paras 386-387 ante.

3 *Wallis v Brightwell* (1722) 2 P Wms 88; *Saunders v Drake* (1742) 2 Atk 465; *Pierson v Garnet* (1786) 2 Bro CC 38; *Malcolm v Martin* (1790) 3 Bro CC 50; *Holmes v Holmes* (1830) 1 Russ & M 660.

4 *Raymond v Brodbelt* (1800) 5 Ves 199. Where a different currency is expressly indicated with regard to some legacies, and none is indicated with regard to others, the latter are payable in the currency of the domicile: *Saunders v Drake* (1742) 2 Atk 465; *Pierson v Garnet* (1786) 2 Bro CC 38; *Malcolm v Martin* (1790) 3 Bro CC 50; *Cockerell v Barber* (1810) 16 Ves 461 at 465.

5 *Saunders v Drake* (1742) 2 Atk 465 at 466; *Pierson v Garnet* (1786) 2 Bro CC 38 at 47. However, the mere fact that the testator owns properties in different countries does not exclude the currency of the domicile: *Saunders v Drake* supra. As to legacies charged on immovables see para 403 ante.

6 *Cockerell v Barber* (1810) 16 Ves 461.

7 *Campbell v Graham* (1831) 1 Russ & M 453; on appeal sub nom *Campbell v Sandford* (1834) 2 Cl & Fin 429 at 450, HL.

8 *Re Eighmie, Colbourne v Wilks* [1935] Ch 524. Thereafter, unless a contrary intention appears on the face of the will, a legacy in the currency of a foreign country carries interest at the local rate: *Saunders v Drake* (1742) 2 Atk 465; *Raymond v Brodbelt* (1800) 5 Ves 199. Cf *Malcolm v Martin* (1790) 3 Bro CC 50, where English interest was given. The true rule is perhaps that interest must be given according to the rate of the country in which the fund is situated: see *Malcolm v Martin* supra at 54n. Cf *Raymond v Brodbelt* supra, which was apparently decided on this principle. See also *Bourke v Ricketts* (1804) 10 Ves 330, where there were two funds, and legatees preferring to take payments out of the English fund were held to be entitled only to English

interest. For the English rate of interest see *Practice Direction--Accounts, Inquiries etc* PD40A para 15; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 733.

9 *Lushington v Sewell* (1827) 1 Sim 435; *Stewart v Garnett* (1830) 3 Sim 398 (both cases of estates in the West Indies). As to the lex situs generally see para 380 ante. As to the lex situs as it relates to foreign immovables see para 399 ante.

UPDATE

455 Certain English principles of construction

NOTE 8--*Practice Direction--Accounts, Inquiries etc* PD40A para 15 substituted.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/C. TESTATE SUCCESSION/456. Material or essential validity.

456. Material or essential validity.

The material or essential validity of a will of movables is governed by the law of the testator's domicile at the date of his death¹. This law has been applied to such questions as whether the testator is bound to leave a part of his movable estate, *legitima portio* or *legitim*², to his widow or children³, and whether a gift of movables to an attesting witness⁴, to a charity⁵, or for superstitious uses⁶ is valid.

The material or essential validity of a will of immovables is governed by the *lex situs*⁷. This law has been applied to such questions as whether the testator is bound to leave a part of his immovable estate to his widow or children⁸, or whether a gift of immovables to a charity is valid⁹, and to questions concerning the nature and incidents of the estates created in the immovables¹⁰.

1 *Whicker v Hume* (1858) 7 HL Cas 124; *Re Priest, Belfield v Duncan* [1944] Ch 58, [1944] 1 All ER 51; *Philipson-Stow v IRC* [1961] AC 727, [1960] 3 All ER 814, HL; *Re Levick's Will Trust, Ffennell v IRC* [1963] 1 All ER 95, [1963] 1 WLR 311. As to wills generally see WILLS.

2 *Legitim*, in Scottish law, is the children's share of the father's movable property which he cannot otherwise dispose of by will. *Legitima portio* in some continental European systems means much the same thing.

3 *Thornton v Curling* (1824) 8 Sim 310; *Campbell v Beaufoy* (1859) John 320; *Re Trufort, Trafford v Blanc* (1887) 36 ChD 600; *Re Groos, Groos v Groos* [1915] 1 Ch 572; *Bartlett v Bartlett* [1925] AC 377, PC; *Re Annesley, Davidson v Annesley* [1926] Ch 692; *Re Ross, Ross v Waterfield* [1930] 1 Ch 377; *Re Adams, Bank of Ireland Trustee Co Ltd v Adams* [1967] IR 424. These cases are better regarded as raising a question of material or essential validity rather than one of capacity, as the restriction under the law of the domicile attached in each case to the property rather than the person of the testator: see para 449 ante. Analogous rights exist under English law by virtue of the English court's power to award reasonable financial provision out of the estate of a deceased person. The court's jurisdiction is limited to cases where the deceased died domiciled in England, whether the property is movable or immovable: Inheritance (Provision for Family and Dependents) Act 1975 s 1 (amended by the Law Reform (Succession) Act 1995 s 2). The burden of proving an English domicile lies on the applicant: *Mastaka v Midland Bank Executor and Trustee Co Ltd* [1941] Ch 192, [1941] 1 All ER 236. As to family provision see further EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 667. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

4 *Re Priest, Belfield v Duncan* [1944] Ch 58, [1944] 1 All ER 51. See now the Wills Act 1968, validating gifts to supernumerary attesting witnesses; and see generally WILLS.

5 *Macdonald v Macdonald* (1872) LR 14 Eq 60 (marshalling in favour of a charity).

6 *Re Elliott, Elliott v Johnson* (1891) 39 WR 297. As to superstitious uses see CHARITIES vol 8 (2010) PARAS 63-64.

7 *Philipson-Stow v IRC* [1961] AC 727, [1960] 3 All ER 814, HL; *Re Levick's Will Trusts, Ffennell v IRC* [1963] 1 All ER 95, [1963] 1 WLR 311. As to the *lex situs* see para 380 ante.

8 *Re Hernando, Hernando v Sawtell* (1884) 27 ChD 284; *Bartlett v Bartlett* [1925] AC 377, PC; *Re Ross, Ross v Waterfield* [1930] 1 Ch 377.

9 *Whicker v Hume* (1858) 7 HL Cas 124; *Duncan v Lawson* (1889) 41 ChD 394; *Re Hoyles, Row v Jagg* [1911] 1 Ch 179; *Re Grassi, Stubberfield v Grassi* [1905] 1 Ch 584.

10 *Earl Nelson v Lord Bridport* (1846) 8 Beav 547 (change in nature of estate from entailed to absolute interest); *Re Moses, Moses v Valentine* [1908] 2 Ch 235 (right to enjoy lease in specie); *Re Miller, Bailie v Miller* [1914] 1 Ch 511 (disposability of entailed interest). See para 402 ante.

UPDATE

456 Material or essential validity

NOTE 3--Inheritance (Provision for Family and Dependants) Act 1975 s 1 further amended: Civil Partnership Act 2004 Sch 4 para 15.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/C. TESTATE SUCCESSION/457. Election.

457. Election.

The question whether a beneficiary under a will must elect between taking a benefit given to him by the will and taking a benefit to which he is entitled outside the will, but which is given to another person by the will, is one of material or essential validity¹. Thus, where the benefit under the will consists of movables, the question whether the beneficiary is put to his election is governed by the law of the testator's domicile at the date of his death, irrespective of the *lex situs* of any immovables which may constitute the benefit outside the will². Where the benefit under the will consists of immovables, the question of election is governed by the *lex situs* of those immovables, again irrespective of the *lex situs* of any immovables which may constitute the benefit outside the will and irrespective of the law of the testator's domicile³.

The heir to an entailed interest in English immovables is not put to his election between those immovables and any benefit given him by the will⁴.

1 Cf *Re Mengel's Will Trusts, Westminster Bank Ltd v Mengel* [1962] Ch 791 at 797, [1962] 2 All ER 490 at 492. In theory, an alternative would be to treat the doctrine of election as a matter of the testator's intention (as to the consequences of which see para 453 ante). However, the doctrine of election has nothing to do with intention, and, consequently, nothing to do with construction of the testator's will: *Re Mengel's Will Trusts, Westminster Bank Ltd v Mengel* supra at 800 and 495, not following *Re Allen's Estate, Prescott v Allen and Beaumont* [1945] 2 All ER 264. As to the application of the doctrine of election in English law see EQUITY. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. As to wills generally see WILLS.

2 *Re Ogilvie, Ogilvie v Ogilvie* [1918] 1 Ch 492 at 498; *Re Mengel's Will Trusts, Westminster Bank Ltd v Mengel* [1962] Ch 791, [1962] 2 All ER 490. For cases illustrating this principle see also *Balfour v Scott* (1793) 6 Bro Parl Cas 550, HL; *Brodie v Barry* (1813) 2 Ves & B 127; *Trotter v Trotter* (1828) 4 Bli NS 502, HL; *Dundas v Dundas* (1830) 2 Dow & CI 349, HL; *Allen v Anderson* (1846) 5 Hare 163; *Maxwell v Maxwell* (1852) 2 De GM & G 705; *Harrison v Harrison* (1873) 8 Ch App 342; *Baring v Ashburton* (1886) 54 LT 463; *Brown v Gregson* [1920] AC 860, HL (where a rule of the *lex situs* preventing a beneficiary from giving up foreign immovables taken outside the will exonerated him from the duty to elect under Scottish domestic law). As to the *lex situs* generally see para 380 ante. As to the *lex situs* as it relates to foreign immovables see para 399 ante.

3 For cases illustrating this principle see *Johnson v Telford* (1830) 1 Russ & M 244; *Maxwell v Maxwell* (1852) 2 De GM & G 705; *Dewar v Maitland* (1866) LR 2 Eq 834; *Orrell v Orrell* (1871) 6 Ch App 302.

4 This is a special rule for the heir to English land. A distinction has been drawn between the heir to English immovables and the heir to foreign immovables. The heir to English immovables can take both the immovables and the benefits given him by the will: *Hearle v Greenbank* (1749) 1 Ves Sen 298; *Re De Virte, Vaiani v De Virte* [1915] 1 Ch 920. Cf *Boughton v Boughton* (1750) 2 Ves Sen 12 (election imposed by express condition). On the other hand, the heir to foreign immovables (the succession to which falls to be determined by English law) is put to his election: *Brodie v Barry* (1813) 2 Ves & B 127; *Dundas v Dundas* (1830) 2 Dow & CI 349, HL; *Dewar v Maitland* (1866) LR 2 Eq 834; *Orrell v Orrell* (1871) 6 Ch App 302; *Harrison v Harrison* (1873) 8 Ch App 342; *Re Ogilvie, Ogilvie v Ogilvie* [1918] 1 Ch 492. Descent to the heir was abolished except in the case of entailed interests (Administration of Estates Act 1925 s 45), so that it is now only the heir to an entailed interest in English immovables who can claim the benefit of this rule. In all other cases of succession to English immovables following an ineffective disposition by will the immovables pass to the persons entitled on intestacy, who have no beneficial interest in the property until an assent or conveyance is made in their favour: *Stamp Duties Comr (Queensland) v Livingston* [1965] AC 694, [1964] 3 All ER 692, PC; *Lall v Lall* [1965] 3 All ER 330, [1965] 1 WLR 1249. Accordingly, as the testator cannot be said to have purported to dispose of property belonging to them, they cannot be put to an election. As to election see further EQUITY; and as to descent to the heir and succession on intestacy see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) para 583 et seq.

724 The doctrine of election as applied to wills

NOTE 4--See also *Frear v Frear* [2008] EWCA Civ 1320, [2009] 1 FLR 391, [2009] 2 FCR 727.

UPDATE

457 Election

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/C. TESTATE SUCCESSION/458. Testamentary revocation.

458. Testamentary revocation.

The question whether a will is revoked by a later will or codicil containing an express revocation clause is governed by the law governing the validity of the later instrument¹. So far as its formal validity is concerned, it will be treated as properly executed if its execution complied with the choice of law rules², or, in so far as it revokes a will or any provision of a will which is formally valid under the Wills Act 1963, if its execution conformed to any law by reference to which the revoked will or provision would be so treated³.

It seems that other testamentary modes of revocation⁴ are governed by the law of the testator's domicile in the case of movables⁵ and by the *lex situs* in the case of immovables⁶.

1 *Cottrell v Cottrell* (1872) LR 2 P & D 397; *Re Manifold, Slater v Chryssaffinis* [1962] Ch 1, [1961] 1 All ER 710. This depends on the choice of law rules for wills of movables so far as the instrument purports to revoke a will of movables, and on the choice of law rules for wills of immovables so far as it purports to revoke a will of immovables. The question of validity must be distinguished from the question of construction of the revocation clause, which is governed, *prima facie*, by the law of the testator's domicile: *Re Wayland's Estate* [1951] 2 All ER 1041; *Re Manifold, Slater v Chryssaffinis* *supra* (revocation clause in will dealing with property in one country does not necessarily revoke will dealing with property in another country). The question whether a later will impliedly revokes an earlier will is similarly one of construction, governed, *prima facie*, by the law of the testator's domicile. As to construction see para 453 *ante*. As to wills generally see WILLS.

2 See paras 450-451 *ante*.

3 Wills Act 1963 s 2(1)(c).

4 Eg by destruction of the will.

5 *Velasco v Coney* [1934] P 143 (a case on the exercise of a power of appointment by will). As to whether the domicile referred to in the text is the domicile at the date of revocation or at the date of death see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1050.

6 This would seem to follow from principle: see para 443 *ante*. As to the *lex situs* generally see para 380 *ante*. As to the *lex situs* as it relates to foreign immovables see para 399 *ante*.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/C. TESTATE SUCCESSION/459. Revocation by subsequent marriage.

459. Revocation by subsequent marriage.

The question whether marriage revokes a previous will of movables¹ is governed by the law of the testator's domicile at the date of the marriage². A subsequent change of domicile is immaterial³.

The question whether marriage revokes a previous will of immovables is governed by the *lex situs*⁴.

1 See the Wills Act 1837 s 18 (substituted by the Administration of Justice Act 1982 s 18(1)). The rule of English law which makes a will null and void on marriage is part of matrimonial law and not of testamentary law: *Re Martin, Loustalan v Loustalan* [1900] P 211 at 240, CA. As to the law in question see WILLS vol 50 (2005 Reissue) para 379 et seq. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Re Reid's Goods* (1866) LR 1 P & D 74; *Re Martin, Loustalan v Loustalan* [1900] P 211, CA; *Re Groos's Estate* [1904] P 269; *Re Von Faber's Goods* (1904) 20 TLR 640; *Westerman's Executor v Schwab* (1905) 8 F 132, Ct of Sess.

3 *Re Reid's Goods* (1866) LR 1 P & D 74; *Re Groos's Estate* [1904] P 269.

4 *Re Earl of Caithness* (1891) 7 TLR 354. Cf *Re Martin, Loustalan v Loustalan* [1900] P 211 at 234, CA. However, see to the contrary Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1051-1052, citing *Davies v Davies* (1915) 31 WLR 396 at 399, 24 DLR 737 at 740 (Alta); *Re Howard* (1924) 54 OLR 109 at 119, [1924] 1 DLR 1062 at 1071. As to the *lex situs* generally see para 380 ante. As to the *lex situs* as it relates to foreign immovables see para 399 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/D. TESTAMENTARY EXERCISE OF POWER OF APPOINTMENT/460. Capacity.

D. TESTAMENTARY EXERCISE OF POWER OF APPOINTMENT

460. Capacity.

A testator has capacity to exercise by will a power of appointment over movables if he has capacity to make the will by the law of his domicile, even though he has no capacity by the law governing the instrument of creation¹.

The capacity of a testator to exercise by will a power of appointment over immovables is governed by the *lex situs*².

1 *Re Lewal's Settlement Trusts, Gould v Lewal* [1918] 2 Ch 391 (where, however, the instrument of creation provided that the donee might exercise the power 'by will or codicil executed in such manner as to be valid according to the law of her domicile': see at 396). Capacity by the law governing the instrument of creation is probably also sufficient wherever the law of the domicile does not govern the essential validity of the appointment, as to which see para 463 post. The point arose, but did not have to be decided, in *Re Langley's Settlement Trusts, Lloyds Bank Ltd v Langley* [1961] 1 All ER 78, [1961] 1 WLR 41; on appeal [1962] Ch 541, [1961] 3 All ER 803, CA (power of withdrawal from fund). As to capacity to make a will see para 449 ante. As to the law governing marriage settlements see paras 416-417 ante. As to powers generally see POWERS. As to wills generally see WILLS.

2 However, there is no English authority on this point. As to the *lex situs* governing immovables generally see para 449 ante. As to the *lex situs* generally see para 380 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/D. TESTAMENTARY EXERCISE OF POWER OF APPOINTMENT/461. Formal validity.

461. Formal validity.

A will exercising a power of appointment will be treated as properly executed if its execution complied with the choice of law rules¹ or conformed to the law governing the essential validity of the power². In so far as it exercises the power, it will not be treated as improperly executed by reason only that its execution was not in accordance with any formal requirements contained in the instrument creating the power³.

1 See paras 450-452 ante. Compliance with the formal requirements of the law of the testator's domicile was a way of satisfying the common law rule for the formal validity of the exercise of a power: *D'Huart v Harkness* (1865) 34 Beav 324; *Re Price, Tomlin v Latter* [1900] 1 Ch 442; *Re Wilkinson's Settlement, Butler v Wilkinson* [1917] 1 Ch 620. As to wills generally see WILLS.

2 Wills Act 1963 s 2(1)(d), confirming the rule at common law. See *Tatnall v Hankey* (1838) 2 Moo PCC 342; *Re Alexander's Goods* (1860) 29 LJPM & A 93; *Re Hallyburton's Goods* (1866) LR 1 P & D 90; *Re Huber's Goods* [1896] P 209; *Re Tréfond's Goods* [1899] P 247; *Murphy v Deichler* [1909] AC 446, HL; *Re Baker's Settlement Trusts, Hunt v Baker* [1908] WN 161.

3 Wills Act 1963 s 2(2).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/D. TESTAMENTARY EXERCISE OF POWER OF APPOINTMENT/462. Construction.

462. Construction.

The question whether a will exercises a power of appointment will be determined, *prima facie*, by the law of the testator's domicile at the date of execution of the will¹. If there is a sufficient indication that he intended the will to be construed in accordance with the law governing the instrument of creation², or if powers of appointment are unknown to the law of the testator's domicile³, the question will be determined by the law governing the instrument of creation⁴.

1 *Re Price, Tomlin v Latter* [1900] 1 Ch 442 at 452; *Re D'Este's Settlement Trusts, Poulter v D'Este* [1903] 1 Ch 898 at 905; *Re Simpson, Coutts & Co v Church Missionary Society* [1916] 1 Ch 502; *Re McMorran, Mercantile Bank of India Ltd v Perkins* [1958] Ch 624, [1958] 1 All ER 186; *Durie's Trustees v Osborne* 1960 SC 444. For the rule of English domestic law see the Wills Act 1837 s 27 (as amended); and POWERS vol 36(2) (Reissue) para 297. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. For the meaning of 'English domestic law' see para 2 note 3 ante. As to wills generally see WILLS.

2 *Re Price, Tomlin v Latter* [1900] 1 Ch 442.

3 *Re Price, Tomlin v Latter* [1900] 1 Ch 442; *Re Baker's Settlement Trusts, Hunt v Baker* [1908] WN 161; *Re Simpson, Coutts & Co v Church Missionary Society* [1916] 1 Ch 502; *Re Wilkinson's Settlement, Butler v Wilkinson* [1917] 1 Ch 620; *Re Lewal's Settlement Trusts, Gould v Lewal* [1918] 2 Ch 391; *Re Strong, Strong v Meissner* (1925) 95 LJCh 22; *Re Waite's Settlement Trusts, Westminster Bank Ltd v Brouard* [1958] Ch 100, [1957] 1 All ER 629; *Re Fenston's Settlement, Max-Muller v Simonsen* [1971] 3 All ER 1092 at 1095-1096, [1971] 1 WLR 1640 at 1644-1645. Cf *Re McMorran, Mercantile Bank of India Ltd v Perkins* [1958] Ch 624, [1958] 1 All ER 186. See also to the contrary *Re D'Este's Settlement Trusts, Poulter v D'Este* [1903] 1 Ch 898; *Re Scholefield, Scholefield v St John* [1905] 2 Ch 408 (although neither case has been followed).

4 In a case where the power arises under an English settlement, and powers of appointment are unknown to the law of the testator's domicile, the court must first interpret the words of the will according to the law governing construction of the will (as to which see para 453 ante) in order to ascertain the testator's intention with regard to the property subject to the power, and it must then decide as a matter of English law whether the power has been exercised: *Re Fenston's Settlement, Max-Muller v Simonsen* [1971] 3 All ER 1092 at 1095, [1971] 1 WLR 1640 at 1644.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/D. TESTAMENTARY EXERCISE OF POWER OF APPOINTMENT/463. Material or essential validity.

463. Material or essential validity.

The material or essential validity of the exercise by will of a power of appointment over movables is governed by the law governing the instrument of creation¹, unless it is the exercise of a general power by which the testator has blended the appointed movables into one mass with his own estate, in which case the material or essential validity of the appointment is governed by the law of the testator's domicile at the date of his death².

The material or essential validity of an appointment of immovables by will is governed by the *lex situs*³.

1 *Pouey v Hordern* [1900] 1 Ch 492 (special power); *Re Mégret, Tweedie v Maunder* [1901] 1 Ch 547 (general power). The reason is that the testator has not disposed by will of his own property; he has only nominated the persons whose names are to be inserted in the settlement creating the power: *Re Pryce, Lawford v Pryce* [1911] 2 Ch 286 at 296, CA. As to wills generally see WILLS.

2 *Re Pryce, Lawford v Pryce* [1911] 2 Ch 286, CA; *Re Khan's Settlement, Coutts & Co v Senior Dowager Begum of Bhopal* [1966] Ch 567, [1966] 1 All ER 160 (not following *Re Waite's Settlement Trusts, Westminster Bank Ltd v Brouard* [1958] Ch 100, [1957] 1 All ER 629). Cf *Pouey v Hordern* [1900] 1 Ch 492 at 495. The reason is that by his disposition the testator has shown an intention that the movables subject to the power should be treated as being, and deemed to be, part of his free estate: see *Re Pryce, Lawford v Pryce* supra; *Re Khan's Settlement, Coutts & Co v Senior Dowager Begum of Bhopal* supra. See also POWERS vol 36(2) (Reissue) para 316.

3 *Re Hernando, Hernando v Sawtell* (1884) 27 ChD 284. As to the *lex situs* generally see para 380 ante. As to the *lex situs* as it relates to foreign immovables see para 399 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/9. SUCCESSION/(2) BENEFICIAL DISTRIBUTION/(ii) Choice of Law/D. TESTAMENTARY EXERCISE OF POWER OF APPOINTMENT/464. Revocation.

464. Revocation.

The question of the revocation of the exercise by will of a power of appointment is governed by the choice of law rules¹.

¹ See paras 458-459 ante. See also *Velasco v Coney* [1934] P 143. By English domestic law, a will exercising a power of appointment is not revoked by the subsequent marriage of the testator if the appointed property would not pass to his executor or administrator or the persons entitled on intestacy in default of appointment: Wills Act 1837 s 18(2) (substituted by the Administration of Justice Act 1982 s 18(1)). As to the meanings of 'England', 'English' and 'English law' see para 4 ante. For the meaning of 'English domestic law' see para 2 note 3 ante. As to wills generally see WILLS.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/10. CORPORATIONS/(1) STATUS, DOMICILE AND POWERS/465. Recognition of foreign corporations.

10. CORPORATIONS

(1) STATUS, DOMICILE AND POWERS

465. Recognition of foreign corporations.

English law recognises the existence of a corporation duly created in a foreign country, and will allow it to sue and be sued in England in its corporate capacity¹. It follows that whether a corporation has continued in existence, or has been dissolved, is likewise governed by the law of its place of incorporation².

The law of the place of incorporation determines who is entitled to act on behalf of the corporation³, and also the extent of an individual member's liability for the corporation's debts⁴. English courts are reluctant to interfere in domestic issues between members of a foreign corporation, especially where the exercise of discretionary powers is in issue⁵. Nevertheless, all matters such as these, which are part of the internal management of the corporation, are in principle governed by the law of the place of incorporation⁶.

The same principle has been extended: (1) to permit an international organisation (which as such has no legal personality and hence no capacity to sue or be sued in England⁷) which has incorporated itself under the domestic law of a foreign country to be recognised as a corporation⁸; and (2) to an international organisation recognised by a number of foreign states but whose proper law is public international law⁹. It has been further extended, by analogy, to recognise the legal personality created under the law of a foreign country of other corporate bodies¹⁰.

1 *Henriques v General Privileged Dutch Co Trading to West Indies* (1728) 2 Ld Raym 1532; *Newby v von Oppen and Colt's Patent Firearms Manufacturing Co* (1872) LR 7 QB 293; *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289 at 297, HL. Whether a partnership or other entity is a corporation depends on the law of the country where it is formed: *Von Hellfeld v Rechnitzer and Mayer Frères & Co* [1914] 1 Ch 748, CA. As to the meanings of 'England', 'English' and 'English law' see para 4 ante. As to corporations generally see CORPORATIONS.

2 As to dissolution of a foreign corporation see para 468 post. As to the law of the place of incorporation see the Foreign Corporations Act 1991; and para 466 post. Note that the Rome Convention has no application to questions governed by the law of companies and other bodies corporate or unincorporate (such as the creation by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body): art 1 para 2(e). As to the Rome Convention see para 349 note 2 ante. The common law rules continue to govern these issues, although the European Regulation on Insolvency Proceedings applies between member states of the European Union. For the meaning of 'the European Regulation on Insolvency Proceedings' see para 473 note 1 post.

3 *Bank of Ethiopia v National Bank of Egypt and Liguori* [1937] Ch 513, [1937] 3 All ER 8; *Banco de Bilbao v Sancha* [1938] 2 KB 176, [1938] 2 All ER 253, CA; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 919, 972, [1966] 2 All ER 536 at 556, 588, HL; *Damon Compania Naviera SA v Hapag-Lloyd International SA, The Blankenstein, The Bartenstein, The Birkenstein* [1985] 1 All ER 475, [1985] 1 WLR 435, CA.

4 *Risdon Iron and Locomotive Works v Furness* [1906] 1 KB 49, CA; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, sub nom *MacLaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523, HL; *Kutchera v Buckingham International Holdings* [1988] IR 61; cf *Bateman v Service* (1881) 6 App Cas 386, PC.

5 See *Sudlow v Dutch Rhenish Rly Co* (1855) 21 Beav 43; *Re Schintz, Schintz v Warr* [1926] Ch 710, CA. Contrast *Pickering v Stephenson* (1872) LR 14 Eq 322, where the court restrained by injunction the application of a foreign corporation's funds in an ultra vires transaction.

6 See eg *Pergamon Press Ltd v Maxwell* [1970] 2 All ER 809, [1970] 1 WLR 1167; *Sierra Leone Telecommunications Co Ltd v Barclays Bank plc* [1998] 2 All ER 821.

7 *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, sub nom *MacLaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523, HL.

8 *Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114, [1991] 1 All ER 871, HL.

9 *Westland Helicopters Ltd v Arab Organisation for Industrialisation* [1995] 2 All ER 387.

10 *Bumper Development Corp v Metropolitan Police Comr (Union of India, claimants)* [1991] 4 All ER 638, [1991] 1 WLR 1362, CA. See also para 14 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/10. CORPORATIONS/(1) STATUS, DOMICILE AND POWERS/466. Recognition under the Foreign Corporations Act 1991.

466. Recognition under the Foreign Corporations Act 1991.

If at any time:

- 437 (1) any question arises whether a body which purports to have, or which appears to have, lost corporate status under the laws of a territory which is not at that time a recognised state¹ should or should not be regarded as having legal personality as a body corporate under the law of any part of the United Kingdom²; and
- 438 (2) it appears that the laws of that territory are at that time applied by a settled court system in that territory³,

that question and any other material question⁴ relating to the body must be determined (and account must be taken of those laws) as if that territory were a recognised state⁵.

Any registration or other thing done before 25 September 1991⁶ is valid if it would have been valid before that date had the provisions described above then been in force⁷.

1 A 'recognised state' is a territory which is recognised by Her Majesty's government in the United Kingdom as a state: Foreign Corporations Act 1991 s 1(2)(a). The laws of a territory which is so recognised are taken to include the laws of any part of the territory which are acknowledged by the federal or other central government of the territory as a whole: s 1(2)(b). The factors to be taken into account in deciding whether a government existed as the government of a state were considered in *Sierra Leone Telecommunications Co Ltd v Barclays Bank plc* [1998] 2 All ER 821. As to the recognition of foreign states see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1108; and INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 41 et seq. For the meaning of 'United Kingdom' see para 4 ante.

2 Foreign Corporations Act 1991 s 1(1)(a).

3 Ibid s 1(1)(b).

4 A material question is a question, whether as to capacity, constitution or otherwise, which in the case of a body corporate falls to be determined by reference to the laws of the territory under which the body is incorporated: ibid s 1(2)(c).

5 Ibid s 1(1).

6 Ie the day on which the Foreign Corporations Act 1991 came into force: see s 2(3).

7 Ibid s 1(3).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/10. CORPORATIONS/(1) STATUS, DOMICILE AND POWERS/467. Amalgamation.

467. Amalgamation.

If a foreign corporation is amalgamated with another foreign corporation under the law of the place of incorporation, the new entity will be recognised in England¹. If that law provides for the new corporation to succeed to the assets and liabilities of its predecessors, it will be recognised in England as having done so². However, the law of the place of incorporation cannot discharge the new company from the liabilities of the old unless it happens to be the applicable law of the contract giving rise to those liabilities³.

1 *National Bank of Greece and Athens SA v Metliss* [1958] AC 509, [1957] 3 All ER 608, HL; *The Kommunar (No 2)* [1997] 1 Lloyd's Rep 8; *Global Container Lines Ltd v Bonyad Shipping Co* [1999] 1 Lloyd's Rep 287; *The Rio Assu* [1999] 1 Lloyd's Rep 201; *JH Rayner (Mincing Lane) Ltd v Cafénorte SA Importadora e Exportadora SA* [1999] 2 All ER (Comm) 577, [1999] 2 Lloyd's Rep 750, CA; *Eurosteel Ltd v Stinnes AG* [2000] 1 All ER (Comm) 964; *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd* [2000] 2 Lloyd's Rep 550. Cf *RKO Pictures Inc v Cannon Screen Entertainment Ltd* [1990] BCLC 364. For certain procedural consequences of amalgamation see *Toprak Enerji Sanayi AS v Sale Tilney Technology plc* [1994] 3 All ER 483, [1994] 1 WLR 840, not followed in *Industrie Chimiche Italia Centrale v Alexander G Tsavlis & Sons Maritime Co, The Choko Star* [1996] 1 All ER 114, [1996] 1 WLR 774. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *National Bank of Greece and Athens SA v Metliss* [1958] AC 509, [1957] 3 All ER 608, HL; *Steel Authority of India Ltd v Hind Metals Inc* [1984] 1 Lloyd's Rep 405.

3 *Adams v National Bank of Greece SA* [1961] AC 255, [1960] 2 All ER 421, HL; *Eurosteel Ltd v Stinnes AG* [2000] 1 All ER (Comm) 964. As to the discharge of contracts to which the Rome Convention applies see para 365 ante. As to the limitation placed on the Convention with regard to questions governed by the law of companies and other bodies corporate or unincorporate see para 465 note 2 ante. As to the Rome Convention see para 349 note 2 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/10. CORPORATIONS/(1) STATUS, DOMICILE AND POWERS/468. Dissolution.

468. Dissolution.

English¹ law will similarly recognise that a foreign corporation has been dissolved under the law of its place of incorporation, for the will of the sovereign authority which created it can also destroy it². If, according to that law, the corporation is in the process of being wound up, it can still sue and be sued in England³; but if this process has ended and the corporation has been dissolved it is dead in the eyes of English law⁴. Neither it nor its unincorporated English branch can sue or be sued in the English courts⁵. Whether the corporation has been so dissolved is a question of fact depending on the evidence of the foreign law concerned⁶.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289 at 297, HL; *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All ER 1017, [1996] 2 Lloyd's Rep 474, CA; *The Kommunar (No 2)* [1997] 1 Lloyd's Rep 8; *The Rio Assu* [1999] 1 Lloyd's Rep 201; *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd* [2000] 2 Lloyd's Rep 550; and see *Kuwait Airways Corp v Iraq Airways Co* [2001] 1 Lloyd's Rep 161, CA. See also the Foreign Corporations Act 1991; and para 466 ante.

3 *Russian Commercial and Industrial Bank v Comptoir D'Escompte de Mulhouse* [1925] AC 112, HL; *Banque Internationale de Commerce de Petrograd v Goukassow* [1925] AC 150, HL; *Employers' Liability Assurance Corp Ltd v Sedgwick Collins & Co Ltd* [1927] AC 95, HL; *First Russian Insurance Co v London and Lancashire Insurance Co Ltd* [1928] Ch 922.

Many of these cases were concerned with the effect of legislation of the USSR passed after the Revolution of 1917, dissolving banking and insurance companies and confiscating their property. At first it was held that these decrees declaring banking and insurance to be state monopolies did not have the effect of dissolving the Russian companies formerly engaged in those activities, but merely of winding them up; and they were allowed to sue and be sued in England. However, from 1932 onwards it was consistently held, in the light of more reliable evidence as to the legal effect of the decrees, that the Russian banks and insurance companies in question were in fact dissolved in or about December 1917 or January 1918: see the cases cited in note 5 infra.

4 *Russian and English Bank v Baring Bros & Co Ltd* [1932] 1 Ch 435; *Lazard Bros & Co v Midland Bank* [1933] AC 289, HL; *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All ER 1017, [1996] 2 Lloyd's Rep 474, CA; *Phoenix Marine Inc v China Ocean Shipping Co* [1999] 1 Lloyd's Rep 682; *The Rio Assu* [1999] 1 Lloyd's Rep 201; *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd* [2000] 2 Lloyd's Rep 550. However, it will be briefly revived by the making of an English winding up order: see para 505 post.

5 *Russian and English Bank v Baring Bros & Co Ltd* [1932] 1 Ch 435; *Deutsche Bank und Disconto Gesellschaft v Banque des Marchands de Moscou* (1932) 158 LT 364, CA; *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, HL. See note 3 supra.

6 *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, HL; *Re Russo-Asiatic Bank* [1934] Ch 720.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/10.
CORPORATIONS/(1) STATUS, DOMICILE AND POWERS/469. Domicile of corporations.

469. Domicile of corporations.

A corporation is domiciled in the country under the law of which it is incorporated¹. Thus a company formed under the Companies Act 1985 has an English domicile if registered in England, and a Scottish domicile if registered in Scotland². Unlike an individual, it cannot change its domicile, even if it carries on business elsewhere³. Most of the reasons for attributing a domicile to individuals (for example, legitimacy, legitimation, marriage, divorce and succession on death) are inapplicable to corporations; but statutes occasionally refer to the domicile of corporations, thus making it necessary to decide where they are domiciled⁴.

¹ *Gasque v IRC* [1940] 2 KB 80; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3)* [1970] Ch 506 at 544, [1969] 3 All ER 897 at 914. This position is consistent with the provisions of the European Regulation on Insolvency Proceedings, under which the centre of a debtor's main interests is determined for jurisdiction purposes: see para 476 text and notes 1-5 post. For the meaning of 'the European Regulation on Insolvency Proceedings' see para 473 note 1 post.

A corporation incorporated in one country only has a single domicile, ie the one attributed to the country of incorporation: *Saccharin Corp Ltd v Chemische Fabrik von Heyden* [1911] 2 KB 516, CA. A member state of the European Union cannot refuse to register a branch of a company which has been formed according to the law of another member state (and where it has its registered office) even if, in the absence of fraud, the whole of the company's business will be conducted through the branch: Case C-212/97 *Centros Ltd v Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459, [2000] Ch 446, EC. As to whether a corporation, being incorporated in more than one country, can have more than one domicile see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1102.

² See further COMPANIES vol 14 (2009) PARA 122. As to registration under the Companies Act 1985 see COMPANIES. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

³ *Gasque v IRC* [1940] 2 KB 80; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3)* [1970] Ch 506 at 544, [1969] 3 All ER 897 at 914. This does not prevent a corporation being dissolved in the country in which it is incorporated, and 'reincorporating' in another country: see *Hughes v Hannover Rückversicherungs AG* [1997] 1 BCLC 497, CA (domicile in Bermuda recognised after relocation of company to Bermuda and compliance with Bermudan law).

⁴ The Civil Jurisdiction and Judgments Act 1982 s 42 contains rules for determining the domicile of a corporation, but only for the purposes of the jurisdictional rules of that Act: see para 85 ante.

UPDATE

469 Domicile of corporations

NOTE 2--Companies Act 1985 replaced for the most part by Companies Act 2006 as to registration under which see COMPANIES vol 14 (2009) PARA 9 et seq.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/10.
CORPORATIONS/(1) STATUS, DOMICILE AND POWERS/470. Powers of foreign corporations.

470. Powers of foreign corporations.

The powers of a foreign corporation are defined and governed by its constitution as interpreted by the law of its place of incorporation¹. Its powers in relation to a particular transaction may also be limited by the law of the country which governs the transaction in question. But it does not follow that if the transaction is ultra vires the corporation, it must be void. The effect of this lack of capacity on the validity of the transaction is a matter for the law which governs the transaction in question².

¹ *Risdon Iron and Locomotive Works v Furness* [1906] 1 KB 49, CA; *Janred Properties Ltd v Ente Nazionale Italiano per il Turismo* [1989] 2 All ER 444, CA; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, sub nom *MacLaine Watson & Co Ltd v Department of Trade and Industry* [1989] 3 All ER 523, HL; *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep 159. But a company may be estopped from reliance upon its incapacity under the law of its place of incorporation, at least if the particular transaction is governed by English law: *Janred v Ente Nazionale Italiano per il Turismo* supra.

² See *The Saudi Prince* [1982] 2 Lloyd's Rep 255; *Janred Properties v Ente Nazionale Italiano per il Turismo* [1989] 2 All ER 444, CA; *Sierra Leone Telecommunications Co Ltd v Barclays Bank plc* [1998] 2 All ER 821.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/10.
CORPORATIONS/(2) JURISDICTION OVER CORPORATIONS/471. Substantive rules of jurisdiction.

(2) JURISDICTION OVER CORPORATIONS

471. Substantive rules of jurisdiction.

In principle a corporation, English or foreign, may be a defendant to an action in the English courts in the same way as any other defendant having (or recognised as having) legal personality; and the jurisdictional rules applicable to commercial disputes in general will apply to companies as well¹.

However, if a company has its seat in a 'Brussels I' Regulation state or a contracting state, then that Regulation state or contracting state (as the case may be) has exclusive jurisdiction in civil or commercial proceedings which have as their object the validity of the constitution, the nullity or dissolution of companies or other legal persons or associations of natural persons, or the decisions of their organs². It follows that many questions, including those relating to the internal management of a company, may not come before an English court if the company in question has its seat in a 'Brussels I' Regulation state or a contracting state³.

1 See para 62 et seq ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See para 76 text and note 3 ante. As to the meaning of 'Brussels I' Regulation state' see para 65 note 6 ante. A 'contracting state' is a state contracting to the Brussels Convention or the Lugano Convention: see para 65 note 5 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

3 See the Civil Jurisdiction and Judgments Act 1982 s 43; the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, art 3, Sch 1 para 10; and para 85 ante. Note, however, that the 'Brussels I' Regulation and the Brussels and Lugano Conventions, and hence their limitations on jurisdiction, have no application to bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings: see para 74 ante. Such matters are dealt with instead by the European Regulation on Insolvency Proceedings: see para 474 et seq post. For the meaning of 'the European Regulation on Insolvency Proceedings' see para 473 note 1 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/10. CORPORATIONS/(2) JURISDICTION OVER CORPORATIONS/472. Service of process on corporations.

472. Service of process on corporations.

If a corporation is present within England at the time, the corporation may be served with process¹. But it is not always a straightforward matter to determine whether a corporation is present within the jurisdiction.

In relation to a company registered in England under the Companies Act 1985², the company is deemed, wherever it carries on business, to be present in England by virtue of its incorporation and registration under that Act³, and service may be made by leaving it at (or posting it to) the registered office of the company in England⁴. If it is registered in Scotland but has a place of business in England, service may be made at that place, addressed to the manager or head officer there⁵.

A company incorporated outside the United Kingdom, but having established a place of business in Great Britain (an 'oversea company'⁶), must file with the Registrar of Companies the name and address of a person resident in Great Britain authorised to accept service on behalf of the company⁷. Service may then be made on this person⁸. If the company has failed to comply with this obligation, or if the person whose name and address is registered is dead, or refuses service, or cannot be served, process may be served by leaving it at, or posting it to, any place of business established by the company in Great Britain⁹.

If, therefore, a foreign corporation carries on business in England without complying with the requirement to register a person authorised to accept service, it may be served at a place of business established by it within the jurisdiction. A corporation can be treated as having a place of business in England, and therefore as being amenable to English jurisdiction¹⁰, if it carries on business¹¹ in England for a substantial period of time¹² at some fixed and definite place¹³. The business must be that of the corporation¹⁴, not that of an agent who acts for it in England¹⁵. The cause of action need not be in respect of a transaction effected through the corporation's place of business in England: it may be quite independent¹⁶.

In cases for which provision is not otherwise made by any enactment, personal service may be effected by leaving a copy of the document with a person holding a senior position within the corporation¹⁷.

1 See para 62 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 As to registration under the Companies Act 1985 see COMPANIES. This also applies to companies registered under the former legislation: see the Companies Act 1985 ss 675-678; and COMPANIES vol 14 (2009) PARA 9 et seq.

3 This follows from the requirement that a registered company must have a registered office which fixes the country of registration: see the Companies Act 1985 ss 2(1), (2), 287(1) (as substituted). There is no equivalent position for unregistered companies, and, in theory at least, the presence of such a company within the jurisdiction cannot be presumed from the fact of its incorporation. It is thought, however, that the problem of an unregistered company incorporated, but not otherwise present, in England, is unlikely to arise.

4 See *ibid* s 725(1). As an alternative to the method set out in the Companies Act 1985 s 725, service may be effected by a method approved under CPR Pt 6: CPR 6.2(2)(a).

Under CPR Pt 6, any document to be served must be sent or transmitted to, or left at, the address for service given by the party to be served: CPR 6.2(4). Where the party has not given an address for service and no solicitor is acting for the party to be served then, in relation to a company registered in England, the document

must be sent or transmitted to, or left at, the principal office of the company or any place of business of the company within the jurisdiction which has a real connection with the claim: CPR 6.2(6).

5 Companies Act 1985 s 725(2).

6 As to overseas companies see COMPANIES vol 15 (2009) para 1824 et seq. For the meanings of 'United Kingdom' and 'Great Britain' see para 4 ante.

7 See the Companies Act 1985 s 691(1)(b)(ii); and COMPANIES. As to the Registrar of Companies see COMPANIES vol 14 (2009) para 131 et seq.

8 See *ibid* s 695(1). Service may also be effected in this way if the company no longer has an established place of business in Great Britain: see *Rome v Punjab National Bank (No 2)* [1990] 1 All ER 58, [1989] 1 WLR 1211, CA. See also note 9 *infra*.

9 See the Companies Act 1985 s 695(2). As an alternative to the method set out in the Companies Act 1985 s 695, service may be effected by a method approved under CPR Pt 6: CPR 6.2(2)(b).

Under CPR Pt 6, any document to be served must be sent or transmitted to, or left at, the address for service given by the party to be served: CPR 6.2(4). Where the party has not given an address for service and no solicitor is acting for the party to be served then, in relation to a company incorporated outside the United Kingdom, the document must be sent or transmitted to, or left at, any place of business of the company within the jurisdiction: CPR 6.2(6).

10 *Newby v von Oppen and Colt's Patent Firearms Manufacturing Co* (1872) LR 7 QB 293; *Lhoneux Limon & Co v Hong Kong and Shanghai Banking Corp* (1886) 33 ChD 446; *Haggin v Comptoir D'Escompte de Paris* (1889) 23 QBD 519, CA.

11 The activity need not be the principal, or even a major, part of the activity of the corporation: *South India Shipping Corp Ltd v Export-Import Bank of Korea* [1985] 2 All ER 219, [1985] 1 WLR 585, CA.

12 Nine days has been held sufficient in special circumstances, as where a foreign manufacturer of motor cars occupied a stand at an exhibition in London: *Dunlop Pneumatic Tyre Co Ltd v AG für Motor und Motorfahrzeugbau vorm Cudell & Co* [1902] 1 KB 342, CA. But this may be open for reconsideration in the light of *Adams v Cape Industries plc* [1990] Ch 433, [1991] 1 All ER 929, CA ('more than a minimal period of time'), although this case concerned the establishment of a place of business in a foreign jurisdiction.

13 *Saccharin Corp Ltd v Chemische Fabrik von Heyden AG* [1911] 2 KB 516 at 523, 525-526, CA; *The Theodoros* [1977] 2 Lloyd's Rep 428; cf *Littauer Glove Corp v FW Millington (1920) Ltd* (1928) 44 TLR 746; *Okura & Co Ltd v Forsbacka Jernverks AB* [1914] 1 KB 715, CA. The possession of property, either freehold, or by lease or licence, is the accepted test of having a place of business: *Adams v Cape Industries plc* [1990] Ch 433, [1991] 1 All ER 929, CA. However, see *Domansa v Derin Shipping and Trading Co Inc* [2001] 1 Lloyd's Rep 362 (in a modern commercial context, doing business does not require a constant physical presence or constant activity or employees).

14 *La Bourgogne* [1899] P 1, CA (affd sub nom *Compagnie Générale Trans-Atlantique v Thomas Law & Co, La Bourgogne* [1899] AC 431, HL); *Saccharin Corp Ltd v Chemische Fabrik von Heyden AG* [1911] 2 KB 516, CA; *Thames and Mersey Marine Insurance Co v Società di Navigazione a Vapore del Lloyd Austriaco* (1914) 111 LT 97, CA; *The World Harmony* [1967] P 341, [1965] 2 All ER 139.

15 *Walter Nutter & Co v Messageries Maritimes de France* (1885) 54 LJQB 527; *The Princesse Clémentine* [1897] P 18; *Allison v Independent Press Cable Association of Australasia Ltd* (1911) 28 TLR 128, CA; *Okura & Co Ltd v Forsbacka Jernverks AB* [1914] 1 KB 715, CA; *The Lalandia* [1933] P 56; *Donovan v North German Lloyd SS Co* [1933] IR 33; *The Holstein* [1936] 2 All ER 1660; cf *Sfeir & Co v National Insurance Co of New Zealand Ltd* [1964] 1 Lloyd's Rep 330; *Vogel v R & A Kohnstamm Ltd* [1973] QB 133, [1971] 2 All ER 1428. It will not matter that the agent carries on his own business there as well as his principal's: *Adams v Cape Industries plc* [1990] Ch 433, [1991] 1 All ER 929, CA. The distinction between the two may not always be easy to draw, but it is unlikely that a company will be held to carry on business within the jurisdiction unless contracts are made there to which it is bound: see *Adams v Cape Industries plc* *supra*.

16 *Haggin v Comptoir D'Escompte de Paris* (1889) 23 QBD 519, CA; *Compagnie Générale Trans-Atlantique v Thomas Law & Co, La Bourgogne* [1899] AC 431, HL; *Logan v Bank of Scotland* [1904] 2 KB 495 at 499, CA; *Actieselskabet Dampskib Hercules v Grand Trunk Pacific Rly Co* [1912] 1 KB 222, CA.

17 See CPR 6.4(4). However, a foreign corporation alleged to be carrying on business within the jurisdiction must be served in accordance with the rules previously set out.

A 'person holding a senior position' includes, in respect of a corporation, a director, the treasurer, secretary, chief executive, manager or other officer of the corporation: *Practice Direction--Service* PD6 para 6.2(1). As to

who is an officer of the corporation, contrast *Dunlop Pneumatic Tyre Co Ltd v AG für Motor und Motorfahrzeugbau vorm Cudell & Co* [1902] 1 KB 342, CA (a motor car salesman at an exhibition is such an officer) with *Mackereth v Glasgow and South Western Rly Co* (1873) LR 8 Exch 149 (a railway booking clerk is not).

UPDATE

472 Service of process on corporations

NOTES 2-9--Companies Act 1985 replaced for the most part by Companies Act 2006.

NOTE 2--As to registration under the Companies Act 2006 see COMPANIES vol 14 (2009) PARA 9 et seq.

NOTE 3--See now Companies Act 2006 ss 9(2), 86; and COMPANIES vol 14 (2009) PARAS 111, 129.

NOTES 4, 9, 17--CPR Pt 6 substituted: SI 2008/2178.

NOTE 4--See now Companies Act 2006 s 1139; and COMPANIES vol 15 (2009) PARA 1836.

NOTE 5--Now Companies Act 2006 s 1139(4): see COMPANIES vol 15 (2009) PARA 1836.

NOTE 7--Companies Act 1985 s 691 repealed: Companies Act 2006 Sch 16.

NOTES 8, 9--See now Companies Act 2006 s 1139(2); and COMPANIES vol 15 (2009) PARA 1836.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(1) INTRODUCTION/473. Cross-border insolvency law.

11. INSOLVENCY

(1) INTRODUCTION

473. Cross-border insolvency law.

Cross-border insolvency proceedings, which involve assets situated in more than one country, naturally raise issues that require resolution by conflict of laws rules. Attempts have been made to harmonise laws in this area. The European Regulation on Insolvency Proceedings¹ governs certain issues in relation to proceedings falling within its scope, namely insolvency proceedings of specified types which are opened in member states of the European Union (except Denmark)². Provision has also been made to allow for the incorporation into English³ law of the UNCITRAL Model Law on Cross-border Insolvency⁴, which provides rules for co-operation between courts of United Nations states and for the mutual recognition of their judgments.

However, subject to the European Regulation on Insolvency Proceedings, and pending adoption of the UNCITRAL Model Law, English cross-border insolvency law relies largely on the common law, together with relevant provisions of the Insolvency Act 1986, which are drafted so as to be capable of applying to situations regardless of jurisdictional ties⁵. In particular, English law continues to apply:

- 439 (1) in respect of the governing law and procedural law in insolvency proceedings⁶;
- 440 (2) in respect of the types of proceedings that fall outside the scope of the European Regulation⁷;
- 441 (3) in respect of debtors domiciled outside the European Union (or where, even if the debtor is domiciled in the European Union, the centre of the debtor's main interest lies outside the European Union)⁸; and
- 442 (4) in respect of states which are not member states of the European Union (in relation to which, under the European Regulation, member states may adopt their own national rules)⁹.

¹ ie EC Council Regulation 1346/2000 (OJ L160, 30.6.2000, p 1) on insolvency proceedings. See further para 474 et seq post.

² The specified proceedings include both individual and corporate cross-border insolvency: see para 475 post. As to member states of the European Union and the position of Denmark in relation to the European Regulation on Insolvency Proceedings see para 474 note 2 post.

³ As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

⁴ ie the Report on the work of the 30th session of UNCITRAL, 12-30 May 1997: *Official Records of the General Assembly of the United Nations, Fifty-second Session, Supplement No 17 (A/52/17) Annex I* pp 68-78. 'UNCITRAL' means the United Nations Commission on International Trade Law, established by the UN General Assembly in 1966 (Resolution 2205(XXI) of 17 December 1966) to remove or reduce the disparities in national laws which create obstacles to the flow of international trade. As to the United Nations generally see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 519 et seq.

As to the power of the Secretary of State to make regulations for the purpose of giving effect, with or without modifications, to the model law on cross-border insolvency see the Insolvency Act 2000 s 14; and para 499 post. At the date at which this volume states the law, no such regulation had been made. As to the Secretary of State see para 126 note 1 ante.

5 See, however, the Insolvency Act 1986 s 426(5) (para 508 post) which makes specific reference to the rules of private international law.

6 In these respects, the European Regulation on Insolvency Proceedings gives prominence to the private international insolvency laws of the member state in which the proceedings are conducted. See para 486 post. As to English law which governs proceedings relating to individual insolvency see paras 500-504 post. As to English law which governs proceedings relating to corporate insolvency see paras 505-509 post.

7 See note 2 *supra*.

8 See para 475 post.

9 See para 474 note 1 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(i) In general/474. Introduction.

(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS

(i) In general

474. Introduction.

The European Regulation on Insolvency Proceedings¹ governs, between member states of the European Union (except Denmark)², matters of jurisdiction in relation to opening cross-border insolvency proceedings and judgments arising therefrom, and the recognition and enforcement of such judgments³. It also harmonises, to the extent that it applies, the law applicable to insolvency proceedings in member states⁴, replacing (within its scope) the national rules of private international law. However, it does not provide uniform rules for the grounds on which insolvency proceedings may be opened in the individual member states; nor does it seek to harmonise or affect national insolvency rules and procedures, which continue to apply⁵.

1 As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante. The Regulation applies only to insolvency proceedings opened after its entry into force (ie 31 May 2002: art 47) so that acts done by a debtor before this date continue to be governed by the law which was applicable to them at the time they were done: art 43.

After its entry into force, the European Regulation on Insolvency Proceedings replaced various bilateral agreements that previously applied in the relations between member states of the European Union (see note 2 infra): see further art 44 paras 1-2. It also supplanted the European Union Convention on Insolvency Proceedings of 23 November 1995 (see *the Seventh Report of the Select Committee on The European Communities Convention on Insolvency Proceedings* (HL Paper 59 (1995-96)) p 18), which was not signed by the United Kingdom and, consequently, did not come into force anywhere in the European Union.

The European Regulation on Insolvency Proceedings does not apply:

- 152 (1) in any member state, to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy from a convention concluded by that state with one or more third countries before the entry into force of the Regulation (art 44 para 3(a)); and
- 153 (2) in the United Kingdom of Great Britain and Northern Ireland, to the extent that is irreconcilable with the obligations arising in relation to bankruptcy and the winding up of insolvent companies from any arrangements with the Commonwealth existing at the time the Regulation enters into force (art 44 para 3(b)).

For the meanings of 'United Kingdom' and 'Great Britain' see para 4 ante. As to the Commonwealth generally see COMMONWEALTH vol 13 (2009) PARA 701 et seq.

2 Denmark is not bound by or subject to the European Regulation on Insolvency Proceedings: Recital 33. In relation to the European Regulation on Insolvency Proceedings, the term 'member state' must be construed accordingly.

3 See *ibid* Recital 6. The legal basis for the Regulation is the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) arts 61, 67 (formerly arts 73i, 73o; renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)*[1999] All ER (EC) 646, ECJ). The simplification of formalities achieved by the Regulation is considered necessary to the proper functioning of the internal market and the objective comes within the scope of judicial co-operation in civil matters within the meaning of the EC Treaty art 65 (formerly art 73m; and as so renumbered): see the European Regulation on Insolvency Proceedings Recital 2. Insolvency proceedings relating to bankruptcy, the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of the 'Brussels I' Regulation, the Brussels Convention and the Lugano Convention: see the European Regulation on Insolvency Proceedings Recital 7; the 'Brussels I' Regulation art 1 para 2; the Brussels Convention art 1 para 2; and the Lugano Convention art 1 para 2. As to the exclusions which operate under the 'Brussels I' Regulation and the Brussels and Lugano Conventions see para 74 note 7 ante. As to the 'Brussels I' Regulation

see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

4 See the European Regulation on Insolvency Proceedings Recital 23. In doing so, the Regulation provides conflict of law rules which, to the extent that the Regulation applies, fill the gap left by exclusions from the Rome Convention. As to questions governed by the law of companies and other bodies corporate or unincorporate which are excluded under the Rome Convention see art 1 para 2(e); and para 350 text and note 11 ante. As to the Rome Convention see para 349 note 2 ante.

5 As to the national rules that apply to English proceedings see para 500 et seq post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(i) In general/475. Scope of the Regulation.

475. Scope of the Regulation.

The European Regulation on Insolvency Proceedings applies to collective insolvency proceedings¹ which entail the partial or total divestment² of a debtor³ and the appointment of a liquidator⁴. However, it applies only to proceedings where the centre of the debtor's main interests is located in a member state of the European Union⁵. The Regulation gives jurisdiction to the courts of a member state to open insolvency proceedings in relation to a corporate debtor incorporated outside the European Union, if the centre of the debtor's main interests is in that member state⁶. The Regulation does not apply to insolvency proceedings concerning insurance undertakings, credit institutions, or investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings⁷.

1 All references in the European Regulation on Insolvency Proceedings to 'insolvency proceedings' are references to the collective proceedings referred to in the text: art 2 para (a). The European Regulation on Insolvency Proceedings Annex A provides that the term includes, in the case of the United Kingdom:

154 (1) company voluntary arrangements (see the Insolvency Act 1986 Pt I (ss 1-7B) (as amended); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1169 et seq);

155 (2) administration orders (see Pt II (ss 8-27); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 215 et seq);

156 (3) creditors' and members' voluntary winding up subject to confirmation by the court (see Pt IV Ch IV (ss 97-106), Pt IV Ch VI (ss 117-162), Pt V (ss 220-229); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 432 et seq); and

157 (4) bankruptcy (see Pt IX (ss 264-371); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 124 et seq).

In the case of the United Kingdom, the term does not include administrative receivership (as to which see para 509 post) or winding up orders that are made on just or equitable grounds (as to which see para 505 text and note 11 post). In the case of voluntary winding up proceedings, confirmation by a court is a pre-requisite for recognition in other member states under the European Regulation on Insolvency Proceedings. For the meaning of 'United Kingdom' see para 4 ante. For the meaning of 'member state' in this context see para 474 note 2 ante. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

2 The European Regulation on Insolvency Proceedings does not define either 'partial divestment' or 'total divestment'.

3 The European Regulation on Insolvency Proceedings applies to insolvency proceedings whether the debtor is a natural person or a legal person, a trader or an individual: Recital 9. That is to say, the Regulation applies to individual cross-border insolvency proceedings (ie bankruptcy) as well as to corporate cross-border insolvency proceedings.

4 Ibid art 1 para 1. The relevant proceedings (comprising acts and formalities set down in law) not only must comply with the provisions of the European Regulation on Insolvency Proceedings but they must also be officially recognised and legally effective in the member state in which the insolvency proceedings are opened: Recital 10.

'Liquidator' means any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs: art 2 para (b). The persons and bodies referred to include, in the case of the United Kingdom, a liquidator, a supervisor of a voluntary arrangement, an administrator, an official receiver, a trustee and a judicial factor: Annex C. As to the powers and duties of a liquidator appointed by a court with jurisdiction under the Regulation see para 484 post.

5 Ibid Recital 14. The member states' different national laws apply where the European Regulation on Insolvency Proceedings does not. See para 500 et seq post. The 'centre of main interests' is not defined in the Regulation but it corresponds to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties: Recital 13. See *Geveran Trading Co Ltd v Skjevesland* [2002] EWCA Civ 1567, [2003] 1 All ER 1, [2003] 1 WLR 912.

6 *Re BRAC Rent-A-Car International Inc* [2003] EWHC 128 (Ch), [2003] 2 All ER 201, [2003] 1 WLR 142. See also *Re The Salvage Association* [2003] EWHC 1028 (Ch), [2003] 3 All ER 246 (where it was held that there was jurisdiction to make an administration order in respect of an association incorporated by royal charter with its centre of main interest in the United Kingdom).

7 European Regulation on Insolvency Proceedings art 1 para 2. These undertakings are not covered by the Regulation because they are subject to special arrangements and the national supervisory authorities have extremely wide-ranging powers of intervention: Recital 9. See EC Council Directive 98/26 of 19 May 1998 (OJ L166, 11.06.98, p 45) on settlement finality in payment and securities settlement systems (see para 492 note 2 post); EC Council Directive 2001/17 of 19 March 2001 (OJ L110, 20.04.2001, p 28) on the reorganisation and winding up of insurance undertakings; and EC Council Directive 2001/24 of 4 April 2001 (OJ L125, 05.05.2001, p 15) on the reorganisation and winding up of credit institutions (to be implemented by 5 May 2004). For the meaning of 'insurance undertaking' see EC Council Directive 73/239 (OJ L228, 16.8.73, p 3) and EC Council Directive 79/267 (OJ L63, 13.3.79, p 1); and INSURANCE vol 25 (2003 Reissue) para 33. 'Credit institution' is defined in EC Council Directive 2000/12 of 20 March 2000 (OJ L126, 26.05.2000, p 1), that is to say an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account (art 1 para 1). An 'investment undertaking' (as defined in EC Council Directive 93/22 (OJ L141, 11.6.93, p 27)) and a 'collective investment undertaking' are subject to EC Council Directive 85/611 (OJ L375, 31.12.85, p 3): see CORPORATIONS vol 9(2) (2006 Reissue) para 1105.

UPDATE

475 Scope of the Regulation

NOTES 1, 4--EC Council Regulation 1346/2000 Annexes A, C replaced: EC Council Regulation 788/2008 (OJ L213, 8.8.2008, p 1).

NOTE 7--Directive 85/611 replaced with effect from 1 July 2011: European Parliament and EC Council Directive 2009/65 (OJ L302, 17.11.2009, p 32). Directive 98/26 amended: European Parliament and EC Council Directive 2009/44 (OJ L146, 10.6.2009, p 37). Directive 2000/12 replaced: European Parliament and EC Council Directive 2006/48 (OJ L177, 30.6.2006, p 1) (as amended). For the meaning of 'credit institution' see now Directive 2006/48 art 1(1).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(i) In general/476. The opening of proceedings.

476. The opening of proceedings.

The European Regulation on Insolvency Proceedings¹ establishes international jurisdiction by designating the courts² of the member state within the territory of which the centre of a debtor's main interests is situated³ as having jurisdiction to open insolvency proceedings⁴. In the case of a company or legal person, the place of the registered office is presumed to be the centre of its main interests in the absence of proof to the contrary⁵. These proceedings are known as 'main proceedings'; they have universal scope and aim at encompassing all the debtor's assets⁶.

In order to protect the diversity of interests, the European Regulation on Insolvency Proceedings permits secondary proceedings to be opened, to run in parallel with the main proceedings⁷. Where the centre of a debtor's main interests is situated within the territory of a member state, the courts of another member state⁸ have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other member state⁹. The effects of those proceedings are restricted to the assets of the debtor situated in the territory of the latter member state¹⁰.

1 As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

2 'Court' means the judicial body or any other competent body of a member state empowered by national law to open insolvency proceedings or to take decisions in the course of such proceedings: *ibid* art 2 para (d). The expression 'court' should be given a broad meaning and includes a person or body empowered by national law to open insolvency proceedings (ie the proceedings do not necessarily have to involve the intervention of a judicial authority): Recital 10. For the meaning of 'member state' in this context see para 474 note 2 ante. For the meaning of 'insolvency proceedings' see para 475 note 1 ante.

3 As to the centre of a debtor's main interests see para 475 note 5 ante.

4 European Regulation on Insolvency Proceedings art 3 para 1.

5 *Ibid* art 3 para 1. This is consistent with the requirement of English domestic law: see para 469 ante.

6 *Ibid* Recital 12. In English proceedings, any application made under the Insolvency Act 1986 must state whether the European Regulation on Insolvency Proceedings applies and, if so, whether the proceedings are main proceedings, secondary proceedings or territorial proceedings: see the Insolvency Rules 1986, SI 1986/1925, r 1.3(2)(g) (company voluntary arrangements), r 2.3 (administration), r 5.3 (individual voluntary arrangements), and r 7.6 (creditors' voluntary winding up subject to confirmation by the court). See also the Insolvent Partnerships Order 1994, SI 1994/2421 (amended by SI 1996/1308; SI 2001/767; SI 2001/3649; SI 2002/1308) (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1204 et seq); and the Administration of Insolvent Estates of Deceased Persons Order 1986, SI 1986/1999 (amended by SI 2002/1309) (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 823 et seq). As to secondary proceedings see the text and note 7 *infra*. As to territorial proceedings see para 477 post.

7 European Regulation on Insolvency Proceedings Recital 12. As to the opening of secondary proceedings see para 478 post.

8 Ie a member state other than that where the centre of the debtor's main interests is situated. See para 478 et seq post.

9 European Regulation on Insolvency Proceedings art 3 para 2. 'Establishment' means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods: art 2 para (h). The terms 'non-transitory' and 'human means and goods' are not defined.

It seems that when corporate groups are organised through locally-registered subsidiaries, the requirements of art 3 para 1 would be satisfied more easily than the requirements of art 3 para 2 (ie proceedings would have to be conducted against each subsidiary as main proceedings rather than as secondary proceedings).

10 Ibid art 3 para 2. The 'member state in which assets are situated' means: (1) in the case of tangible property, the member state within the territory of which the property is situated; (2) in the case of property and rights ownership of or entitlement to which must be entered in a public register, the member state under the authority of which the register is kept; (3) in the case of claims, the member state within the territory of which the third party required to meet them has the centre of his main interests, as determined in the main proceedings: art 2 para (g).

UPDATE

476 The opening of proceedings

NOTE 4--See Case C-339/07 *Seagon v Deko Marty Belgium NV* [2009] 1 WLR 2168, [2009] All ER (D) 112 (Feb), ECJ (courts of member state within territory in which proceedings opened had jurisdiction to decide action to set aside transaction brought against company which had its registered office in another member state).

NOTES 4, 9--See *Shierson v Vlieland-Boddy* [2005] EWCA Civ 974, [2005] 1 WLR 3966 (jurisdiction to open proceedings established under art 3(2), but not under art 3(1)).

NOTE 6--SI 1986/1925 r 2.3 now r 2.4 (amended by SI 2003/1730). SI 1994/2421 further amended: SI 2002/1555, SI 2002/2708, SI 2005/1516, SI 2006/622. See *Byers v Yacht Bull Corp* [2010] EWHC 133 (Ch), (2010) Times, 15 February.

NOTE 7--See *Re Nortel Networks SA* [2009] EWHC 206 (Ch), [2009] BPIR 316, [2009] All ER (D) 128 (Feb) (desirable to seek assistance of foreign courts prior to opening of secondary insolvency proceedings).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(i) In general/477. Co-ordination of proceedings.

477. Co-ordination of proceedings.

The European Regulation on Insolvency Proceedings¹ provides mandatory rules of co-ordination between the main proceedings² and any secondary proceedings³ to satisfy the need for unity in the European Union⁴. Where main proceedings have been opened⁵, any proceedings opened subsequently⁶ are secondary proceedings, and are limited to winding up proceedings⁷.

It is possible for secondary proceedings to be opened prior to the opening of the main proceedings, but only where:

- 443 (1) main proceedings cannot be opened because of the conditions laid down by the law of the member state where the centre of the debtor's main interest is situated; or
- 444 (2) the opening of proceedings is requested by a local creditor⁸, or one whose claim arises from the operation of the local establishment⁹.

In these cases, the proceedings are known as 'territorial proceedings' and jurisdiction for them must be established by the national law of the member state concerned¹⁰. Once main proceedings are opened, 'territorial proceedings' become 'secondary proceedings'.

The liquidator in the main proceedings may request that insolvency proceedings previously opened in another member state¹¹ be converted into winding up proceedings if this proves to be in the interests of the creditors in the main proceedings¹². The court with jurisdiction to open secondary proceedings¹³ must order conversion into winding up proceedings¹⁴.

The liquidator in the main proceedings may also request the court which has opened secondary proceedings to stay the liquidation process¹⁵.

1 As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

2 For the meaning of 'main proceedings' see para 476 ante.

3 As to the meaning of 'secondary proceedings' see para 476 ante.

4 European Regulation on Insolvency Proceedings Recital 12. As to the role played by liquidators in co-ordinating proceedings see para 485 post.

5 Ie as described in para 476 text and notes 1-6 ante.

6 Ie as described in para 476 text and notes 7-10 ante.

7 European Regulation on Insolvency Proceedings art 3 para 3. 'Winding up proceedings' means insolvency proceedings involving realising the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets: art 2 para (c). In the case of the United Kingdom, this includes: (1) winding up by or subject to the supervision of the court; (2) creditors' voluntary winding up (with confirmation by the court); and (3) bankruptcy (or, in Scotland, sequestration): see Annex B.

8 Ie one who has its domicile, habitual residence or registered office in the member state where the establishment is situated. For the meaning of 'member state' in this context see para 474 note 2 ante.

9 European Regulation on Insolvency Proceedings art 3 para 4. This restriction is intended to limit to what is absolutely necessary those cases where territorial insolvency proceedings are requested before the main insolvency proceedings: Recital 17.

10 Ibid Recital 15. See also art 3 para 4.

11 Ie territorial proceedings of a type listed in ibid Annex A (see para 475 note 1 ante).

12 Ibid art 37. As to the liquidators' role in co-ordinating proceedings see para 485 post. As to applications made to the English court by a liquidator appointed in another member state for conversion of insolvency proceedings see the Insolvency Rules 1986, SI 1986/1925, Pt 1 Ch 7 (rr 1.31-1.33) (company voluntary arrangements), Pt 2 Ch 7 (rr 2.59-2.61) (administration), Pt 5 Ch 7 (rr 5.35-5.38) (individual voluntary arrangements), and Pt 7 Ch 10 (rr 7.62-7.63) (creditors' voluntary winding up subject to confirmation by the court).

13 Ie the court with jurisdiction under the European Regulation on Insolvency Proceedings art 3 para 2 (see para 476 ante).

14 Ibid art 37. The winding up proceedings referred to in the text are listed in Annex B (see note 7 supra).

15 See para 479 post.

UPDATE

477 Co-ordination of proceedings

NOTE 7--Also, head (4) winding up through administration, including appointments made by filing prescribed documents with the court: EC Council Regulation 1346/2000 Annex B as amended in relation to the UK by EC Regulation 603/2005 (OJ L100, 20.4.2005, p 1).

NOTE 12--SI 1986/1925 Pt 2 Ch 7 (rr 2.59-2.61) now Pt 2 Ch 14 (rr 2.130-2.132); Pt 5 Ch 7 (rr 5.35-5.38) now Pt 2 Ch 12 (rr 5.62-5.65) (amended by SI 2003/1730).

NOTE 15--See *Re Nortel Networks SA* [2009] EWHC 206 (Ch), [2009] All ER (D) 128 (Feb) (desirable to seek assistance of foreign courts prior to opening of secondary insolvency proceedings).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(ii) Secondary Insolvency Proceedings/478. Opening of secondary proceedings.

(ii) Secondary Insolvency Proceedings

478. Opening of secondary proceedings.

The opening of main proceedings¹ by a court of a member state which is recognised in another member state permits the opening in that other member state of secondary insolvency proceedings² without the debtor's insolvency being examined in that other state³. The secondary insolvency proceedings are limited in their effect to the assets of the debtor situated within the territory where the secondary proceedings are being held⁴.

The opening of secondary proceedings may be requested either by the liquidator in the main proceedings or by any other person or authority which is empowered to request the opening of insolvency proceedings under the law of the member state within the territory of which the opening of secondary proceedings is requested⁵.

Where the main proceedings are opened subsequent to the opening of secondary proceedings in another member state, the provisions relating to secondary proceedings⁶ apply to those opened first, in so far as the progress of those proceedings so permits⁷.

Except as otherwise provided for⁸, the law applicable to secondary proceedings is that of the member state within whose territory the secondary proceedings are opened⁹.

1 For the meaning of 'main proceedings' see para 476 ante.

2 The court of that other member state must have jurisdiction pursuant to the European Regulation on Insolvency Proceedings art 3 para 2 (see para 476 ante); and the secondary insolvency proceedings must be among those listed in Annex B, ie they must be restricted to winding up proceedings (see para 477 note 7 ante): art 27. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante. For the meaning of 'member state' in this context see para 474 note 2 ante. As to the meaning of 'secondary proceedings' see para 476 ante.

3 Ibid art 27.

4 Ibid art 27.

5 Ibid art 29 paras (a), (b).

Requests to open secondary insolvency proceedings may be made to serve a purpose besides the protection of local interests: Recital 19. For instance, the liquidator in the main proceedings may request the opening of secondary proceedings when the efficient administration of the estate so requires: Recital 19. Cases may arise where the estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the state of the opening to the other states where the assets are located: Recital 19.

Where the law of the member state in which the opening of secondary proceedings is requested requires that the debtor's assets be sufficient to cover in whole or in part the costs and expenses of the proceedings, the court may, when it receives such a request, require the applicant to make an advance payment of costs or to provide appropriate security: art 30.

6 See paras 479-482 post.

7 European Regulation on Insolvency Proceedings art 36.

8 Ie except where the European Regulation on Insolvency Proceedings provides conflict of laws rules for certain insolvency related issues: see para 487 et seq post.

9 Ibid art 28.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(ii) Secondary Insolvency Proceedings/479. Stay of liquidation.

479. Stay of liquidation.

The court which opened the secondary proceedings¹ must stay the process of liquidation in whole or in part at the request from the liquidator in the main proceedings², provided that in that event it may require him to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors³. Such a request from the liquidator may be rejected only if it is manifestly of no interest to the creditors in the main proceedings⁴. Such a stay of the process of liquidation may be ordered for up to three months, and may be continued or renewed for similar periods⁵.

The court which opened the secondary proceedings must terminate the stay of the process of liquidation at the request of the liquidator in the main proceedings, or of its own motion, or at the request of a creditor or at the request of the liquidator in the secondary proceedings if that measure no longer appears justified, in particular, by the interests of creditors in the main proceedings or in the secondary proceedings⁶.

1 As to the meaning of 'secondary proceedings' see para 476 ante.

2 For the meaning of 'main proceedings' see para 476 ante.

3 European Regulation on Insolvency Proceedings art 33 para 1. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

4 Ibid art 33 para 1.

5 Ibid art 33 para 1.

6 Ibid art 33 para 2.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(ii) Secondary Insolvency Proceedings/480. Closing of secondary proceedings.

480. Closing of secondary proceedings.

Where the law applicable to secondary proceedings¹ allows for such proceedings to be closed without liquidation by a rescue plan, a composition or a comparable measure, the liquidator in the main proceedings² is empowered to propose such a measure himself³. Closure of the secondary proceedings by such a measure must not become final without the consent of the liquidator in the main proceedings; failing his agreement, however, it may become final if the financial interests of the creditors in the main proceedings are not affected by the measure proposed⁴. Any restriction of creditors' rights arising from a such measure which is proposed in secondary proceedings, such as a stay of payment or discharge of debt, may not have effect in respect of the debtor's assets not covered by those proceedings without the consent of all the creditors having an interest⁵.

1 As to the meaning of 'secondary proceedings' see para 476 ante.

2 For the meaning of 'main proceedings' see para 476 ante.

3 European Regulation on Insolvency Proceedings art 34 para 1. The liquidator is entitled to demand a stay of liquidation of secondary proceedings for this purpose: see para 479 ante. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

4 Ibid art 34 para 1.

5 Ibid art 34 para 2. During a stay of the process of liquidation ordered pursuant to art 33 (see para 479 ante), only the liquidator in the main proceedings or the debtor, with the former's consent, may propose measures in the secondary proceedings (see the text and notes 1-3 supra); no other proposal for such a measure can be put to the vote or approved: art 34 para 3.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(ii) Secondary Insolvency Proceedings/481. Provisional and protective measures.

481. Provisional and protective measures.

The court having jurisdiction to open the main insolvency proceedings has the power to order provisional and protective measures to secure and preserve any of the debtor's assets from the time of the request to open proceedings¹. It may order provisional protective measures in relation to assets situated in the territory of other member states². Where it appoints a temporary administrator prior to the opening of the main insolvency proceedings in order to ensure the preservation of the debtor's assets, that administrator is empowered to request any measures provided for under the law of that state to secure and preserve any of the debtor's assets situated in another member state for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings³.

1 European Regulation on Insolvency Proceedings Recital 16. The court must have jurisdiction pursuant to art 3 para 1 (see para 476 ante). Preservation measures both prior to and after the commencement of the insolvency proceedings are important to guarantee the effectiveness of the insolvency proceedings: Recital 16. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

2 Ibid Recital 16. For the meaning of 'member state' in this context see para 474 note 2 ante.

3 Ibid art 38. In English proceedings, a member state liquidator or a temporary liquidator may apply for the appointment of a provisional liquidator (of a company) or an interim receiver (of an individual) under the Insolvency Rules 1986, SI 1986/1925, rr 4.25, 6.51 and the Insolvency Act 1986 ss 135, 286 (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 491 et seq; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 222 et seq).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(ii) Secondary Insolvency Proceedings/482. Provision of information for creditors and their lodgment of claims.

482. Provision of information for creditors and their lodgment of claims.

Any creditor may lodge his claim in the main proceedings and in any secondary proceedings¹.

Foreign creditors², including the tax authorities and social security authorities of member states, have the right to lodge claims in writing in each of the insolvency proceedings relating to the debtor's asset which are pending in the European Union³. As soon as insolvency proceedings are opened in a member state⁴, the court of that state having jurisdiction, or the liquidator appointed by it, must immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other member states by means of an individual notice, which must in particular include time limits, the penalties laid down in regard to those time limits, and the body or authority empowered to accept the lodgment of claims, as well as the other measures laid down⁵. The notice must indicate also whether creditors whose claims are preferential or secured in rem need lodge their claims⁶.

For his part, a creditor must send copies of supporting documents, if any, and indicate the nature of the claim, the date on which it arose and its amount, as well as whether he alleges preference, security in rem or a reservation of title in respect of the claim and what assets are covered by the guarantee he is invoking⁷.

In order to ensure equal treatment of creditors, the distribution of proceeds is also co-ordinated⁸. A creditor who, after the opening of main proceedings, obtains by any means, in particular through enforcement, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another member state, must return what he has obtained to the liquidator, subject to the provisions regarding third parties' rights in rem and reservation as to title⁹.

In order to ensure equal treatment of creditors, a creditor who has, in the course of insolvency proceedings, obtained a dividend on his claim must share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend¹⁰.

1 European Regulation on Insolvency Proceedings art 32 para 1. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

2 I.e. any creditor who has his habitual residence, domicile or registered office in a member state other than the state of the opening of proceedings: *ibid* art 39. As to the state of the opening of proceedings see para 486 note 1 post.

3 *Ibid* art 39. See also Recital 21. This provision derogates from the application of national law, pursuant to art 4 para 2(h) (see para 486 note 10 post), and means that their claims cannot be disallowed on the grounds that the creditor is situated abroad or that the claim is governed by foreign public law, including foreign penal or revenue claims. As to the general exclusion of foreign law under English conflict of laws rules see para 30 et seq ante. For the meaning of 'member state' in this context see para 474 note 2 ante.

4 *Ibid* art 40 para 1.

5 *Ibid* art 40 para 2.

6 *Ibid* art 40 para 2.

7 *Ibid* art 41.

8 *Ibid* Recital 21.

9 Ibid art 20 para 1. As to main proceedings see art 3 para 1; and para 476 ante. As to the provisions regarding third parties' rights in rem see art 5; and para 488 post. As to the provisions regarding reservation as to title see art 7; and para 490 post.

10 Ibid art 20 para 2.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(iii) The Liquidator/483. Evidencing and publicising the appointment of a liquidator.

(iii) The Liquidator

483. Evidencing and publicising the appointment of a liquidator.

A liquidator's appointment is evidenced by a certified copy of the original decision appointing him or by any other certificate issued by the court which has jurisdiction¹. No legalisation or other similar formality is necessary, although a translation into the official language (or one of the official languages) of the member state within whose territory he intends to act may be required².

The liquidator may request that notice of the judgment opening insolvency proceedings and (where appropriate) the decision appointing him be published in any other member state in accordance with the publication procedures provided for in that state³. The publication must also specify the liquidator appointed and whether the jurisdiction rule applied relates to main proceedings or secondary proceedings⁴. However, any member state within the territory of which the debtor has an establishment⁵ may require mandatory publication there; and, in such cases, the liquidator or any authority empowered to that effect in the member state where the main proceedings are opened must take all necessary measures to ensure such publication⁶.

The liquidator may also request that the judgment opening the main proceedings is registered in the land register, the trade register and any other public register kept in the other member states⁷. However, any member state may require mandatory registration; and, in such cases, the liquidator or any authority empowered to that effect in the member state where the main proceedings have been opened must take all necessary measures to ensure such registration⁸.

The costs of such publication and registration are regarded as costs and expenses incurred in the proceedings⁹.

Where an obligation has been honoured in a member state for the benefit of a debtor who is subject to insolvency proceedings opened in another member state, when it should have been honoured for the benefit of the liquidator in those proceedings, the person honouring the obligation is deemed to have discharged it if he was unaware of the opening of proceedings¹⁰. Where such an obligation is honoured before the publication requested by the liquidator has been effected, the person honouring the obligation is presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings; conversely, where the obligation is honoured after such publication has been effected, the person honouring the obligation is presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings¹¹.

1 European Regulation on Insolvency Proceedings art 19. As to the duties and powers of the liquidator see para 484 post. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

2 Ibid art 19. For the meaning of 'member state' in this context see para 474 note 2 ante.

3 Ibid art 21 para 1. For simple business reasons, publication should take place in other member states where assets of the debtor may be located.

4 Ibid art 21 para 1. As to the jurisdiction rule for main proceedings see art 3 para 1; and para 476 ante. As to the jurisdiction rule for secondary proceedings see art 3 para 2; and para 476 ante.

5 For the meaning of 'establishment' see para 476 note 9 ante.

6 European Regulation on Insolvency Proceedings art 21 para 2. However, publication is not a prior condition for the recognition of foreign proceedings in any case: Recital 29.

7 Ibid art 22 para 1.

8 Ibid art 22 para 2.

9 Ibid art 23.

10 Ibid art 24 para 1. This provision protects the position of persons who have an interest in the insolvency proceedings but who are not in fact aware that such proceedings have been opened and act in good faith in a way that conflicts with those proceedings: Recital 30. Where such persons make a payment to the debtor when they should in fact have made the payment to the foreign liquidator, the payment has a debt-discharging effect: Recital 30.

11 Ibid art 24 para 2.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(iii) The Liquidator/484. The liquidator's duties and powers.

484. The liquidator's duties and powers.

The liquidator appointed by a court which has jurisdiction in the main proceedings¹ may exercise all the powers conferred on him by the law of the state of the opening of proceedings in another member state, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that state². The liquidator may in particular remove the debtor's assets from the territory of any member state in which they are situated, subject to the provisions regarding third parties' rights in rem³ and reservation as to title⁴.

The liquidator appointed by a court which has jurisdiction in territorial or secondary proceedings⁵ may in any other member state claim through the courts or out of court that movable property was removed from the territory of the state of the opening of proceedings to the territory of that other member state after the opening of the insolvency proceedings⁶. He may also bring any action to set aside which is in the interests of the creditors⁷.

In exercising his powers, the liquidator must comply with the law of the member state within whose territory he intends to take action, in particular with regard to procedures for the realisation of assets⁸. However, those powers may not include coercive measures or the right to rule on legal proceedings or disputes⁹.

1 I.e. a court which has jurisdiction pursuant to the European Regulation on Insolvency Proceedings art 3 para 1 (see para 476 ante). As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante. As to the evidencing and publicising of the appointment of a liquidator see para 483 ante.

2 Ibid art 18 para 1. For the meaning of 'member state' in this context see para 474 note 2 ante. As to the state of the opening of proceedings see para 486 note 1 post.

3 As to third parties' rights in rem see ibid art 5; and para 488 post.

4 Ibid art 18 para 1. As to reservation as to title see art 7; and para 490 post.

5 I.e. a court which has jurisdiction pursuant to ibid art 3 para 2 (see paras 476-477 ante).

6 Ibid art 18 para 2. One of the stated aims of the Regulation is to avoid incentives for the parties to transfer assets or judicial proceedings from one member state to another, seeking to obtain a more favourable legal position (known as forum shopping): Recital 4.

7 Ibid art 18 para 2.

8 Ibid art 18 para 3.

9 Ibid art 18 para 3.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(iii) The Liquidator/485. The liquidators' role in co-ordinating proceedings.

485. The liquidators' role in co-ordinating proceedings.

Liquidators in concurrent proceedings play an important role in realising the total assets of a debtor by ensuring that proceedings within and between member states are co-ordinated¹. To this end, the liquidator in the main proceedings and the liquidators in the secondary proceedings are duty bound to co-operate with each other² and to communicate information to each other³. They must immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings⁴.

Furthermore, in order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings is given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time⁵. The liquidator in the secondary proceedings must give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings⁶.

The liquidators in the main and any secondary proceedings must lodge claims in other proceedings which have already been lodged in the proceedings for which they were appointed, provided that the interests of creditors in the latter proceedings are served thereby, subject to the right of creditors to oppose such a move or to withdraw the lodgment of their claims where the law applicable so provides⁷. The liquidator in the main or secondary proceedings is empowered to participate in other proceedings on the same basis as a creditor, in particular by attending creditors' meetings⁸.

If by the liquidation of assets in the secondary proceedings it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings must immediately transfer any assets remaining to the liquidator in the main proceedings⁹.

1 European Regulation on Insolvency Proceedings Recital 20. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante. For the meaning of 'member state' in this context see para 474 note 2 ante.

2 Ibid art 31 para 2. This duty is expressed to be subject to the rules applicable to each of the proceedings: art 31 para 2.

3 Ibid art 31 para 1. This duty is expressed to be subject to the rules restricting the communication of information. The Regulation itself does not contain any such restrictions so this may refer simply to general rules of confidentiality between liquidators. Without prejudice to the generality of the obligations imposed by art 31, where a member state liquidator has been appointed in proceedings and the supervisor is obliged to give notice, or to provide a copy of a document (including an order of court), to the court, the registrar of companies or the official receiver, the supervisor must give notice or provide copies, as appropriate, to the member state liquidator: see the Insolvency Rules 1986, 1986/1925, r 1.34 (company voluntary arrangements), r 2.62 (administration), r 5.38 (individual voluntary arrangements), r 6.238 (bankruptcy) and r 7.64 (creditors' voluntary winding up subject to confirmation by the court).

4 European Regulation on Insolvency Proceedings art 31 para 1. The provisions appear to regulate the bilateral communication of information between the liquidator in the main proceedings and liquidators appointed in secondary proceedings but there seems to be no explicit duty to provide information amongst different liquidators of the secondary proceedings themselves.

5 Ibid Recital 20.

6 Ibid art 31 para 3. For example, he should be able to propose a restructuring plan or composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended: ibid Recital 20.

7 Ibid art 32 para 2.

8 Ibid art 32 para 3. Without prejudice to the generality of the right to participate referred to in art 32 para 3, the member state liquidator is deemed to be a creditor for various purposes (such as entitlement to vote) under the Insolvency Rules 1986, 1986/1925: see r 2.62 (administration), r 4.231 (company voluntary arrangements), r 6.238 (bankruptcy) and r 7.64 (creditors' voluntary winding up subject to confirmation by the court).

9 European Regulation on Insolvency Proceedings art 35.

UPDATE

485 The liquidators' role in co-ordinating proceedings

NOTE 3--SI 1986/1925 r 2.62 now r 2.133; r 5.38 now r 5.65 (amended by SI 2003/1730).

NOTES 3, 8--SI 1986/1925 r 7.64 amended: SI 2009/642.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(iv) The Law Applicable/A. IN GENERAL/486. Law applicable to insolvency proceedings.

(iv) The Law Applicable

A. IN GENERAL

486. Law applicable to insolvency proceedings.

Subject to the other provisions of the European Regulation on Insolvency Proceedings, the law applicable to insolvency proceedings and their effects is that of the member state within whose territory such proceedings are opened¹. The law of the state of the opening of proceedings determines the conditions for the opening of those proceedings, their conduct and their closure, and in particular²:

- 445 (1) against which debtors insolvency proceedings may be brought on account of their capacity³;
- 446 (2) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings⁴;
- 447 (3) the respective powers of the debtor and the liquidator⁵;
- 448 (4) the conditions under which set-offs may be invoked⁶;
- 449 (5) the effects of insolvency proceedings on current contracts to which the debtor is party⁷;
- 450 (6) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending⁸;
- 451 (7) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings⁹;
- 452 (8) the rules governing the lodging, verification and admission of claims¹⁰;
- 453 (9) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off¹¹;
- 454 (10) the conditions for and the effects of closure of insolvency proceedings, in particular by composition¹²;
- 455 (11) creditors' rights after the closure of insolvency proceedings¹³;
- 456 (12) who is to bear the costs and expenses incurred in the insolvency proceedings¹⁴;
- 457 (13) the rules relating to when legal acts detrimental to all the creditors are void, voidable or unenforceable¹⁵.

1 European Regulation on Insolvency Proceedings art 4 para 1. The member state within whose territory such proceedings are opened is referred to as the 'state of the opening of proceedings': art 4 para 1. For the meaning of 'member state' in this context see para 474 note 2 ante. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

2 Ibid art 4 para 2. As to exceptions to this rule see para 487 et seq post.

3 Ibid art 4 para 2(a).

4 Ibid art 4 para 2(b). 'Time of the opening of proceedings' means the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not: art 2 para (f).

5 Ibid art 4 para 2(c).

6 Ibid art 4 para 2(d).

7 Ibid art 4 para 2(e).

8 Ibid art 4 para 2(f).

9 Ibid art 4 para 2(g).

10 Ibid art 4 para 2(h).

11 Ibid art 4 para 2(i).

12 Ibid art 4 para 2(j).

13 Ibid art 4 para 2(k).

14 Ibid art 4 para 2(l).

15 Ibid art 4 para 2(m). This provision does not apply where the person who has benefited from an act detrimental to all the creditors provides proof that: (1) the said act is subject to the law of a member state other than that of the state of the opening of proceedings; and (2) that law does not allow any means of challenging that act in the relevant case: art 13.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(iv) The Law Applicable/B. THE LAW APPLICABLE TO CERTAIN ISSUES/487. In general.

B. THE LAW APPLICABLE TO CERTAIN ISSUES

487. In general.

The European Regulation on Insolvency Proceedings¹ provides conflict of laws rules which replace, within their scope of application², national rules of private international law on insolvency related issues³. They apply both to main proceedings and local proceedings⁴, and address the following cross-border issues⁵: third party security rights⁶; set-off of claims⁷; reservation of title⁸; contracts relating to immovable property⁹; payment systems and financial markets¹⁰; contracts relating to employment¹¹; rights subject to registration¹²; patents and trade marks¹³; actions to set aside transactions which took place before the opening of insolvency proceedings¹⁴; protection of third parties to whom the debtor has disposed of specified forms of property after the opening of insolvency proceedings¹⁵; and pending lawsuits¹⁶.

1 As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

2 As to the scope of the European Regulation on Insolvency Proceedings see para 475 ante.

3 European Regulation on Insolvency Proceedings Recital 23.

4 Ibid Recital 23.

5 The European Regulation on Insolvency Proceedings makes provision for special rules on applicable law in the case of particularly significant rights and legal relationships because it exists against a background of widely differing substantive laws (eg relating to security interests) and different preferential rights enjoyed by some creditors in insolvency proceedings in the European Union: Recital 11. There is a risk that the automatic recognition of insolvency proceedings to which the law of the opening state normally applies may interfere with the rules under which transactions are carried out in other member states: Recital 24. For the meaning of 'member state' in this context see para 474 note 2 ante.

6 Ibid art 5. See para 488 post.

7 Ibid art 6. See para 489 post.

8 Ibid art 7. See para 490 post.

9 Ibid art 8. See para 491 post.

10 Ibid art 9. See para 492 post.

11 Ibid art 10. See para 493 post.

12 Ibid art 11. See para 494 post.

13 Ibid art 12. See para 495 post.

14 Ibid art 13. See para 486 note 15 ante.

15 Ibid art 14. See para 496 post.

16 Ibid art 15. See para 497 post.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(iv) The Law Applicable/B. THE LAW APPLICABLE TO CERTAIN ISSUES/488. Creditors' and third parties' rights in rem.

488. Creditors' and third parties' rights in rem.

The opening of insolvency proceedings in one member state¹ does not affect the rights in rem² of creditors or third parties in respect of tangible or intangible, movable or immovable assets³ belonging to the debtor which are situated within the territory of another member state at the time of the opening of proceedings⁴. The rights affected in particular are:

- 458 (1) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage⁵;
- 459 (2) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee⁶;
- 460 (3) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled⁷;
- 461 (4) a right in rem to the beneficial use of assets⁸.

1 As to the opening of insolvency proceedings see para 476 ante. For the meaning of 'member state' in this context see para 474 note 2 ante.

2 The right, recorded in a public register and enforceable against third parties, under which a right in rem may be obtained, must be considered a right in rem for these purposes: European Regulation on Insolvency Proceedings art 5 para 3. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

3 This includes both specific assets and collections of indefinite assets as a whole which change from time to time: *ibid* art 5 para 1.

4 *Ibid* art 5 para 1. This does not preclude actions for voidness, voidability or unenforceability (see art 4 para 2(m); and para 486 text and note 15 ante): art 5 para 4. For the meaning of 'the time of the opening of proceedings' see para 486 note 4 ante.

There is a particular need for a special reference that diverges from the law of the member state where proceedings have been opened in the case of rights in rem, since these are of importance for the granting of credit: Recital 25. The basis, validity and extent of such a right in rem should therefore normally be determined according to the *lex situs* and not be affected by the opening of insolvency proceedings: Recital 25. As to the *lex situs* generally see para 380 ante. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security: Recital 25. Where assets are subject to rights in rem under the *lex situs* in one member state but the main proceedings are being carried out in another member state, the liquidator in the main proceedings should be able to request the opening of secondary proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there: Recital 25. If a secondary proceeding is not opened, the surplus on sale of the asset covered by rights in rem must be paid to the liquidator in the main proceedings: Recital 25.

Nothing in the Insolvency Rules 1986, SI 1986/1925, rr 6.116-6.118 (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 560 et seq) or in rr 6.198-6.199 (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 415) affects the rights in rem of creditors or third parties protected under the European Regulation on Insolvency Proceedings art 5: Insolvency Rules 1986, SI 1986/1925, r 6.116(3) (added by SI 2002/1307); Insolvency Rules 1986, SI 1986/1925, r 6.198(5) (added by SI 2002/1307).

5 European Regulation on Insolvency Proceedings art 5 para 2(a).

6 *Ibid* art 5 para 2(b).

7 *Ibid* art 5 para 2(c).

8 *Ibid* art 5 para 2(d).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(iv) The Law Applicable/B. THE LAW APPLICABLE TO CERTAIN ISSUES/489. Creditors' right to set-off.

489. Creditors' right to set-off.

The opening of insolvency proceedings does not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim¹.

¹ European Regulation on Insolvency Proceedings art 6 para 1. This does not preclude actions for voidness, voidability or unenforceability (see art 4 para 2(m); and para 486 text and note 15 ante): art 6 para 2. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

If a set-off is not permitted under the law of the member state where proceedings have been opened, a creditor should nevertheless be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In this way, set-off will acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises: Recital 26. For the meaning of 'member state' in this context see para 474 note 2 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(iv) The Law Applicable/B. THE LAW APPLICABLE TO CERTAIN ISSUES/490. Rights based on reservation of title.

490. Rights based on reservation of title.

The opening of insolvency proceedings against the purchaser of an asset in one member state does not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a member state other than the state of opening of proceedings¹.

The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, does not constitute grounds for rescinding or terminating the sale and does not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a member state other than the state of the opening of proceedings².

1 European Regulation on Insolvency Proceedings art 7 para 1. This does not preclude actions for voidness, voidability or unenforceability (see art 4 para 2(m); and para 486 text and note 15 ante): art 7 para 3. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante. For the meaning of 'member state' in this context see para 474 note 2 ante. As to the state of the opening of proceedings see para 486 note 1 ante.

2 Ibid art 7 para 2. This does not preclude actions for voidness, voidability or unenforceability (see art 4 para 2(m); and para 486 text and note 15 ante): art 7 para 3.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(iv) The Law Applicable/B. THE LAW APPLICABLE TO CERTAIN ISSUES/491. Law applicable to contracts relating to immovable property.

491. Law applicable to contracts relating to immovable property.

The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immovable property are governed solely by the law of the member state within whose territory the immovable property is situated¹.

¹ European Regulation on Insolvency Proceedings art 8. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante. For the meaning of 'member state' in this context see para 474 note 2 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(iv) The Law Applicable/B. THE LAW APPLICABLE TO CERTAIN ISSUES/492. Law applicable to payment systems and financial markets.

492. Law applicable to payment systems and financial markets.

Subject to the provisions preserving the rights in rem of third parties¹, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market are governed solely by the law of the member state applicable to that system or market².

¹ le without prejudice to the European Regulation on Insolvency Proceedings art 5 (see para 488 ante). As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

² Ibid art 9 para 1. This does not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law applicable to the relevant payment system or financial market: art 9 para 2. For the meaning of 'member state' in this context see para 474 note 2 ante.

This provision is thought to be necessary to protect, for example, the position-closing agreements and netting agreements to be found in payment systems and financial markets as well as the sale of securities and the guarantees provided for such transactions as governed in particular by EC Council Directive 98/26 of 19 May 1998 (OJ L166, 11.6.98, p 45) on settlement finality in payment and securities settlement systems (which contains special provisions which take precedence over the general rules in the European Regulation on Insolvency Proceedings): Recital 27. For such transactions, the only law which is material should be that applicable to the system or market concerned: Recital 27. This provision is intended to prevent the possibility of mechanisms for the payment and settlement of transactions provided for in the payment and set-off systems or on the regulated financial markets of the member states being altered in the case of insolvency of a business partner: Recital 27.

UPDATE

492 Law applicable to payment systems and financial markets

NOTE 2--Directive 98/26 amended: European Parliament and EC Council Directive 2009/44 (OJ L146, 10.6.2009, p 37).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(iv) The Law Applicable/B. THE LAW APPLICABLE TO CERTAIN ISSUES/493. Law applicable to contracts of employment.

493. Law applicable to contracts of employment.

The effects of insolvency proceedings on employment contracts and relationships are governed solely by the law of the member state applicable to the contract of employment¹.

¹ European Regulation on Insolvency Proceedings art 10. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante. For the meaning of 'member state' in this context see para 474 note 2 ante.

This provision is intended to protect employees and jobs by specifying that the law applicable according to the general rules on conflict of law is to determine the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment: Recital 28. However, any other questions relating to insolvency law, such as whether the employees' claims are protected by preferential rights and what status such preferential rights may have, are determined by the law of the state opening proceedings: Recital 28.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(iv) The Law Applicable/B. THE LAW APPLICABLE TO CERTAIN ISSUES/494. Law applicable to rights subject to registration.

494. Law applicable to rights subject to registration.

The effects of insolvency proceedings on the rights of the debtor in immovable property, a ship or an aircraft subject to registration in a public register are determined by the law of the member state under the authority of which the register is kept¹.

¹ European Regulation on Insolvency Proceedings art 11. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante. For the meaning of 'member state' in this context see para 474 note 2 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(iv) The Law Applicable/B. THE LAW APPLICABLE TO CERTAIN ISSUES/495. Community patents and trade marks.

495. Community patents and trade marks.

For the purposes of the European Regulation on Insolvency Proceedings¹, a Community patent, a Community trade mark or any other similar right established by Community law may be considered for inclusion in main proceedings only².

1 As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

2 Ibid art 12. For the meaning of 'main proceedings' see para 476 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(iv) The Law Applicable/B. THE LAW APPLICABLE TO CERTAIN ISSUES/496. Law applicable to third-party purchasers.

496. Law applicable to third-party purchasers.

Where, by an act concluded after the opening of insolvency proceedings, the debtor disposes, for consideration, of:

- 462 (1) an immovable asset; or
- 463 (2) a ship or an aircraft subject to registration in a public register; or
- 464 (3) securities whose existence presupposes registration in a register laid down by law,

the validity of that act is governed by the law of the state within whose territory the immovable asset is situated or under whose authority the register is kept¹.

¹ European Regulation on Insolvency Proceedings art 14. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(iv) The Law Applicable/B. THE LAW APPLICABLE TO CERTAIN ISSUES/497. Law applicable to the effects of insolvency proceedings on lawsuits pending.

497. Law applicable to the effects of insolvency proceedings on lawsuits pending.

The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested are governed solely by the law of the member state in which that lawsuit is pending¹.

¹ European Regulation on Insolvency Proceedings art 15. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante. For the meaning of 'member state' in this context see para 474 note 2 ante.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(2) EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS/(v) Recognition of Insolvency Proceedings/498. Principle and effects of recognition.

(v) Recognition of Insolvency Proceedings

498. Principle and effects of recognition.

The European Regulation on Insolvency Proceedings, rather than national law, provides for the immediate and mutual recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings¹.

Unless the Regulation provides otherwise and as long as no secondary proceedings are opened in another member state², the judgment opening the main proceedings produces the same effects in any other member state as under the law of the state of the opening of proceedings, with no further formalities being required³. The effects of secondary proceedings may not be challenged in other member states⁴.

Any judgment opening insolvency proceedings handed down by a court of a member state which has jurisdiction to open either main or secondary insolvency proceedings in one member state must be recognised in all other member states from the time that it becomes effective in the state of the opening of proceedings⁵. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in this way, and which concern the conduct and closure of insolvency proceedings, and compositions approved by that court, must be recognised with no further formalities⁶. These judgments are to be enforced in accordance with the relevant provisions of the Brussels Convention⁷.

However, member states are not obliged to recognise or enforce a judgment which might result in a limitation of personal freedom or postal secrecy⁸. Nor are they obliged to recognise insolvency proceedings opened in another member state or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that state's public policy, particularly its fundamental principles or the constitutional rights and liberties of the individual⁹.

1 See the European Regulation on Insolvency Proceedings Recital 22. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

2 For the meaning of 'member state' in this context see para 474 note 2 ante.

3 European Regulation on Insolvency Proceedings art 17 para 1. 'Judgment' in relation to the opening of insolvency proceedings or the appointment of a liquidator includes the decision of any court empowered to open such proceedings or to appoint a liquidator: art 2 para (e). As to the state of the opening of proceedings see para 486 note 1 ante.

4 Ibid art 17 para 2. Any restriction of the creditors' rights, in particular a stay or discharge, must produce effects vis-à-vis assets situated within the territory of another member state only in the case of those creditors who have given their consent: art 17 para 2.

5 Ibid art 16 para 1. This provision applies also where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other member states: art 16 para 1. Furthermore, the recognition of main proceedings does not preclude the opening of secondary proceedings (within the meaning of Chapter III (arts 27-38): see paras 477-481, 485 ante) by a court in another member state: art 16 para 2.

Where the courts of two member states both claim competence to open the main insolvency proceedings, the resolution of any dispute must be based on the principle of mutual trust. The decision of the first court to open

proceedings should be recognised in other member states without those member states having the power to scrutinise the court's decision: Recital 22.

6 Ibid art 25 para 1. These provisions apply also to: (1) judgments which derive directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court; and (2) judgments relating to preservation measures taken after the request for the opening of insolvency proceedings: art 25 para 1.

7 Ibid art 25 para 1. The provisions of the Brussels Convention referred to in the text are arts 31-51, with the exception of art 34 para 2 (see paras 187, 190, 192-198 ante). The Brussels Convention also governs the recognition and enforcement of judgments other than those that fall within the European Regulation on Insolvency Proceedings art 25 para 1, provided that that Convention is applicable: European Regulation on Insolvency Proceedings art 25 para 2. As to the Brussels Convention see para 65 note 2 ante.

8 European Regulation on Insolvency Proceedings art 25 para 3. The principle of mutual trust which governs the mutual recognition of judgments delivered by the courts of the member states means that the grounds for non-recognition are reduced to the minimum that are considered to be necessary: Recital 22.

9 Ibid art 26.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(3) UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY/499. The model law.

(3) UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

499. The model law.

The UNCITRAL model law on cross-border insolvency¹ provides mechanisms for dealing with cases of cross-border insolvency so as to promote the following objectives:

- 465 (1) co-operation between the courts and other competent authorities of the enacting state and foreign states involved in cases of cross-border insolvency;
- 466 (2) greater legal certainty for trade and investment;
- 467 (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
- 468 (4) protection and maximisation of the value of the debtor's assets; and
- 469 (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment².

The Secretary of State³ may by regulations make any provision which he considers necessary or expedient for the purpose of giving effect, with or without modifications, to the model law on cross-border insolvency⁴. In particular, the regulations may:

- 470 (a) apply any provision of insolvency law⁵ in relation to foreign proceedings⁶ (whether begun before or after the regulations come into force)⁷;
- 471 (b) modify the application of insolvency law (whether in relation to foreign proceedings or otherwise)⁸; and
- 472 (c) amend the provisions of the Insolvency Act 1986⁹ relating to co-operation in insolvency proceedings between courts¹⁰.

1 For the meaning of 'the UNCITRAL model law on cross-border insolvency' see para 473 note 4 ante.

2 Preamble to the UNCITRAL model law on cross-border insolvency.

3 As to the Secretary of State see para 126 note 1 ante.

4 Insolvency Act 2000 s 14(1). The regulations require the agreement of the Lord Chancellor (see s 14(6)(a)) and must be made by statutory instrument, with a draft laid before and approved by resolution of each House of Parliament (see s 14(5)). The regulations may make different provision for different purposes and may make: (1) any supplementary, incidental or consequential provision; or (2) any transitory, transitional or saving provision, which the Secretary of State considers necessary or expedient: s 14(3). The regulations may apply or, as the case may be, modify the application of insolvency law in relation to the Crown: s 14(2). At the date at which this volume states the law, no such regulation had been made. As to the Lord Chancellor see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) para 477 et seq.

5 For the meaning of 'insolvency law' see para 508 note 5 post (definition applied by *ibid* s 14(4)).

6 'Foreign proceedings' means a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation: UNCITRAL model law on cross-border insolvency art 2(a); applied by the Insolvency Act 2000 s 14(4).

7 *Ibid* s 14(2)(a).

8 *Ibid* s 14(2)(b).

9 le any provision of the Insolvency Act 1986 s 426 (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 28).

10 Insolvency Act 2000 s 14(2)(c).

UPDATE

499 The model law

TEXT AND NOTES--Regulations have been made providing for the UNCITRAL model law to have the force of law: see the Cross-Border Insolvency Regulations 2006, SI 2006/1030 (amended by SI 2009/1941). Nothing in the Insolvency Act 1986 s 388 (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 43) applies to anything done by a foreign representative under or by virtue of SI 2006/1030: reg 8. The Cross-Border Insolvency Regulations 2006, SI 2006/1030, do not allow direct enforcement of the UNCITRAL model law: *Rubin v Eurofinance SA* [2009] EWHC 2129 (Ch), [2009] BPIR 1478, [2009] All ER (D) 102 (Sep).

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/ (4) INDIVIDUAL INSOLVENCY/500. Bankruptcy jurisdiction of the English court.

(4) INDIVIDUAL INSOLVENCY

500. Bankruptcy jurisdiction of the English court.

Subject to the jurisdiction provisions of the European Regulation on Insolvency Proceedings¹, the English court² has jurisdiction to adjudicate bankrupt³ any debtor who:

- 473 (1) is domiciled in England on the day on which the petition is presented⁴; or
- 474 (2) is personally present in England on the day on which the petition is presented⁵; or
- 475 (3) has been ordinarily resident or has had a place of residence in England at any time in the period of three years ending with the day on which the petition is presented⁶; or
- 476 (4) has carried on business in England, personally or by means of an agent or manager, at any time within the period of three years ending with the day on which the petition is presented⁷; or
- 477 (5) was a member of a firm or partnership which has carried on business in England as such or by means of an agent or manager at any time within the period of three years ending with the day on which the petition is presented⁸.

However, if the debtor is, for the time being, bound by a voluntary arrangement proposed by the debtor and approved pursuant to the statutory scheme, there is no specific jurisdictional requirement to be satisfied, for in accepting the voluntary arrangement the debtor has submitted to the jurisdiction of the English court in relation to it⁹.

Subject to the European Regulation on Insolvency Proceedings, whose rules as to jurisdiction and as to the opening, conduct and closing of proceedings are binding¹⁰, the fact that the court has jurisdiction to adjudicate the debtor bankrupt does not mean that it is obliged to exercise that jurisdiction or to hear the petition: it may dismiss the petition or stay the proceedings¹¹. The court may dismiss the petition on the grounds that the debtor possesses no assets within the jurisdiction, or has already been made bankrupt in a foreign country¹², or (more generally) that it is in the circumstances not equitable that the bankruptcy should proceed¹³.

If the debtor is subject to the jurisdiction of the English court, an order may be made for service of the petition on him in such manner as the court directs¹⁴. Substituted service may be ordered if the court is satisfied that prompt personal service cannot be made¹⁵. In order to obtain a full appreciation of the bankrupt's affairs, an order may be made for the public examination of any debtor who is subject to the bankruptcy jurisdiction of the English court¹⁶; but it seems that the power to order the private examination of any other person¹⁷ is limited to those who are present in England and liable to be served with the summons¹⁸.

¹ Insolvency Act 1986 s 265(3) (added by the Insolvency Act 1986 (Amendment) (No 2) Regulations 2002, SI 2002/1240, regs 3, 14). As to the jurisdiction provisions of the European Regulation on Insolvency Proceedings see paras 476-477 ante. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

² I.e. the High Court and the county courts: Insolvency Act 1986 s 373(1). As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 The jurisdictional rules are established by the Insolvency Act 1986 (repealing the Bankruptcy Act 1914), and govern the presentation of a petition by creditor or debtor. See generally BANKRUPTCY AND INDIVIDUAL INSOLVENCY.

4 Insolvency Act 1986 s 265(1)(a). As to domicile see para 35 et seq ante.

A petition for a bankruptcy order may be presented by:

- 158 (1) one of the individual's creditors or jointly by more than one of them (s 264(1)(a));
- 159 (2) by the individual himself (s 264(1)(b));
- 160 (3) by a temporary administrator (within the meaning of the European Regulation on Insolvency Proceedings: see para 481 ante) (s 264(1)(ba) (added by the Insolvency Act 1986 (Amendment) (No 2) Regulations 2002, SI 2002/1240, regs 3, 13));
- 161 (4) by a liquidator (by virtue of and within the meaning of the European Regulation on Insolvency Proceedings: see para 475 note 4 ante) (Insolvency Act 1986 s 264(1)(bb) (added by the Insolvency Act 1986 (Amendment) (No 2) Regulations 2002, regs 3, 13)); or
- 162 (5) by the supervisor of a voluntary arrangement, or any person (other than the debtor) who is for the time being bound by such an arrangement (Insolvency Act 1986 s 264(1)(c)).

A voluntary arrangement (see head (5) supra) is a scheme approved by the court pursuant to the provisions of Pt VIII (ss 252-263) (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 81 et seq): see s 253(1).

Where a person is entitled to present a bankruptcy petition under two or more of heads (1)-(5) supra, he may elect the capacity in which the presentation of the petition is made: see s 266(1).

5 Ibid s 265(1)(b). This ground will also apply to a petition presented by the debtor himself.

6 Ibid s 265(1)(c)(i). For the meaning of 'ordinary residence' see para 58 ante. See also *Re Hecquard, ex p Hecquard* (1889) 24 QBD 71, CA; *Re Nordenfelt* [1895] 1 QB 151, CA; *Re Brauch (a debtor), ex p Britannic Securities and Investments Ltd* [1978] Ch 316, CA; *Geveran Trading Co Ltd v Skjevesland* [2002] EWCA Civ 1567, [2003] 1 All ER 1, [2003] 1 WLR 912.

7 Insolvency Act 1986 s 265(1)(c)(ii), (2)(b). A person still carries on business if he gives up the business and goes abroad leaving unpaid trading debts behind him: *Re A Debtor (No 784 of 1991)* [1992] Ch 554, [1992] 3 All ER 376; cf *Theophile v Solicitor-General* [1950] AC 186, [1950] 1 All ER 405, HL.

8 Insolvency Act 1986 s 265(1)(c)(ii), (2)(a).

9 See note 4 head (5) supra.

10 See para 476 et seq ante.

11 Insolvency Act 1986 s 266(3). See *Re Thulin* [1995] 1 WLR 165. The court's discretion to stay its proceedings on the ground of forum non conveniens may also be exercised unless proceedings are regulated by the European Regulation on Insolvency Proceedings, and so long as it is exercised in accordance with the Civil Jurisdiction and Judgments Act 1982 s 49 (as amended) (see para 130 ante). As to the doctrine of forum non conveniens in the context of the 'Brussels I' Regulation and the Brussels and Lugano Conventions and the relevant provisions of the Civil Jurisdiction and Judgments Act 1982 see para 131 ante. Bankruptcy is excluded from the scope of the 'Brussels I' Regulation, the Brussels and Lugano Conventions, and the Civil Jurisdiction and Judgments Act 1982: see the Civil Jurisdiction and Judgments Act 1982 s 18(3)(ba) (added by the Insolvency Act 1985 s 235, Sch 8 para 36; and amended by the Insolvency Act 1986 s 429, Sch 14); 'Brussels I' Regulation art 1 para 2; Brussels Convention art 1 para 2; Lugano Convention art 1 para 2. See also para 74 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante.

12 *Re Thulin* [1995] 1 WLR 165. The fact that a debtor has been made bankrupt in a foreign country does not deprive the court of jurisdiction to adjudicate him bankrupt in England. English law has not recognised the principle of 'unity of bankruptcy' according to which all creditors must have recourse to a single court, and nothing in the Insolvency Act 1986 is expressed to alter this position: *Re Thulin* supra. But the fact that a debtor has been made bankrupt overseas, especially if coupled with the fact that there are no assets in England, may be a strong reason for the court to exercise its discretion by declining jurisdiction. Cf *Re McCulloch, ex p McCulloch* (1880) 14 ChD 716, CA; *Re Robinson, ex p Robinson* (1883) 22 ChD 816, CA; *Re Artola Hermanos* (1890) 24 QBD 640, CA; *Re Thulin* supra.

13 *Re McCulloch, ex p McCulloch* (1880) 14 ChD 716, CA; *Re Betts, ex p Official Receiver* [1901] 2 KB 39; *Re a Debtor (No 737 of 1928)* [1929] 1 Ch 362, CA.

14 Insolvency Rules 1986, SI 1986/1925, r 12.12(2). A statutory demand (see the Insolvency Act 1986 s 268; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 127) is not a document issued by the court, and permission to serve it out of the jurisdiction is not required: *Practice Direction--Insolvency Proceedings* CPR PD INSOLV para 10.1.

15 Insolvency Rules 1986, SI 1986/1925, r 6.14(2); and see *Re Urquhart, ex p Urquhart* (1890) 24 QBD 723, CA; *Re a Debtor (No 419 of 1939)* [1939] 3 All ER 429, CA.

16 See eg the Insolvency Act 1986 s 290; *Re Seagull Manufacturing Co Ltd (in liquidation)* [1993] Ch 345, [1993] 2 All ER 980, CA. The same is probably true in relation to the private examination of the bankrupt: see the Insolvency Act 1986 s 366(1)(a).

17 See *ibid* s 366(1)(c).

18 The authorities are not conclusive. However, see *Re Tucker (RC) (a bankrupt), ex p Tucker (KR)* [1990] Ch 148, [1988] 1 All ER 603, CA (considering similar provisions of the Bankruptcy Act 1914 (now repealed)); *Re Tucker (a bankrupt) (No 2), ex p the Trustee v Langton Investment SA* [1988] 2 All ER 339, [1988] 1 WLR 497; *Re Seagull Manufacturing Co Ltd (in liquidation)* [1993] Ch 345, [1993] 2 All ER 980, CA. See also *Union Bank of Finland Ltd v Lelakis* [1996] 4 All ER 305, [1997] 1 WLR 590, CA (service out of the jurisdiction of an order for oral examination ancillary to execution after judgment is valid if the proceedings are appropriate for such service without permission).

UPDATE

500 Bankruptcy jurisdiction of the English court

NOTE 4--See *Henwood v Barlow Clowes International Ltd (in liquidation)* [2007] EWHC 1579 (Ch), [2007] BPIR 1329 (revsd on a different point [2008] EWCA Civ 577, [2008] BPIR 778, [2008] All ER (D) 330 (May)) (debtor's knowledge that bankruptcy laws of another jurisdiction were more favourable to him did not prevent him from acquiring domicile there).

NOTE 16--Insolvency Act 1986 s 366(1)(a) amended: Civil Partnership Act 2004 Sch 27 para 120.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/ (4) INDIVIDUAL INSOLVENCY/501. Effect of an English bankruptcy on debtor's property.

501. Effect of an English bankruptcy on debtor's property.

The assignment of a bankrupt's property to the trustee in bankruptcy under the Insolvency Act 1986 operates to transfer title to all the debtor's property, whether movable or immovable, and whether situated in England¹ or elsewhere².

Although an English court may consider that a transfer of foreign land has been effectively made, it may in practice be difficult for the trustee to enforce his title in the foreign jurisdiction. Even so, if the debtor is personally present within the jurisdiction, the court may be able to order him to act to support the trustee in obtaining an effective title to the land in a foreign jurisdiction³. Further, any court in the United Kingdom is obliged to assist another such court in insolvency matters upon request; and a request to a Scottish or Northern Irish court for assistance could enable an English trustee to obtain an effective title to property in Scotland or Northern Ireland⁴. A similar scheme exists under which the Secretary of State may designate other countries for the purposes of mutual assistance in insolvency matters⁵, and the European Regulation on Insolvency Proceedings provides for the co-ordination of concurrent proceedings within the European Union where that Regulation applies⁶.

A court may restrain a creditor from taking proceedings abroad to recover a debt due from a bankrupt debtor in order to preserve the principle of equal distribution among creditors. If the creditor has claimed in the English bankruptcy he may be so restrained⁷; if he is resident in England he may likewise be restrained⁸. It is unclear to what extent the courts retain a power to compel a creditor who has satisfied his claim against the debtor abroad to pool those assets for the benefit of creditors generally; but it is thought that the power has survived the Insolvency Act 1986⁹. Such a creditor will not be allowed to prove under the English bankruptcy unless he brings the assets into hotchpot¹⁰. If he chooses not to prove in the English bankruptcy he may still be ordered to pool the assets as if he were subject to the restraining jurisdiction of the English court¹¹.

1 As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See the Insolvency Act 1986 ss 283, 306, 436 (s 283 as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 216 et seq. In other words, the assignment of property to the trustee is universal (contrast with para 500 note 12 ante), and the Insolvency Act 1986, to the extent that it operates to transfer foreign land to the trustee, claims to have a wider effect than would be acknowledged by an English court as the consequence of a foreign bankruptcy (see para 504 post). The property must be that of the debtor, and it will be assigned subject to such charges and burdens as are recognised by the *lex situs*: *Re Somes, ex p De Lemos* (1896) 3 Mans 131; *Galbraith v Grimshaw* [1910] AC 508, HL; *Re Sykes, Cloghran Stud Farm Co v The Trustee* (1932) 101 LJCh 298, DC; *Re Doyle, ex p Brien v Doyle* (1993) 112 ALR 653; cf *Murphy's Trustee v Aitken* 1983 SLT 78, Ct of Sess. As to the *lex situs* generally see para 380 ante. As to the *lex situs* as it relates to foreign immovables see para 399 post. See also *Re Hayward* [1997] Ch 45, [1997] 1 All ER 32 (an attempt by the trustee in the bankruptcy of a deceased to alter a foreign property register in respect of property which his widow had transferred to a third party in the foreign country concerns a right to legal ownership which is a right in rem, and proceedings to establish ownership are not an aspect of bankruptcy law, leaving the court of the *lex situs* of the property with exclusive jurisdiction in the matter).

Where proceedings are conducted following the application of the jurisdiction rules of the European Regulation on Insolvency Proceedings, the definition of property is modified to refer to property that may be dealt with in such proceedings: Insolvency Act 1986 s 436A (added by the Insolvency Act 1986 (Amendment) (No 2) Regulations 2002, SI 2002/1240, regs 3, 18). As to the European Regulation on Insolvency Proceedings see para 474 et seq ante.

3 If the foreign court follows the same approach as the English conflict of laws rules, this will be the case: see Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1173.

4 See the Insolvency Act 1986 s 426 (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 28.

5 Ibid s 426(4), (11); and the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986, SI 1986/2123 (applied and modified by SI 2001/1090); Co-operation of Insolvency Courts (Designation of Relevant Countries) Order 1996, SI 1996/253 (applied and modified by SI 2001/1090); Co-operation of Insolvency Courts (Designation of Relevant Country) Order 1998, SI 1998/2766 (applied and modified by SI 2001/1090); and see para 508 post. As to the Secretary of State see para 126 note 1 ante.

6 See para 477 et seq ante. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante. See also the Insolvency Rules 1986, SI 1986/1925. If, to the petitioner's knowledge, there is a member state liquidator appointed in main proceedings in relation to the bankrupt, a copy of the petition must be sent by him to the member state liquidator: r 6.14(5) (added by SI 2002/1307). As to a member state liquidator's duties and powers see para 484 ante.

7 *Re Tait & Co, ex p Tait* (1872) LR 13 Eq 311. Cf *Barclays Bank plc v Homan* [1993] BCLC 680.

8 *Re Distin, ex p Ormiston* (1871) 24 LT 197.

9 See *Re Paramount Airways Ltd (in administration)* [1993] Ch 223, [1992] 3 All ER 1, CA.

10 *Re Morton, ex p Robertson* (1875) LR 20 Eq 733; *Re Hooper, Banco de Portugal v Waddell* (1880) 5 App Cas 161, HL. However, this rule applies only to assets which under English law formed part of the estate in liquidation, and a secured creditor who had obtained his security before insolvency proceedings commenced was entitled to realise his security and still prove in liquidation proceedings for the balance owing to him because the security did not form part of the liquidation estate: *Cleaver v Delta American Reinsurance Co (in liquidation)* [2001] UKPC 6, [2001] 2 AC 328.

11 See the cases in notes 7-8 supra.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/ (4) INDIVIDUAL INSOLVENCY/502. Choice of law in an English bankruptcy.

502. Choice of law in an English bankruptcy.

The question of jurisdiction is generally determinative also of the question as to which substantive and procedural law governs insolvency proceedings¹. Consequently, where an English court has jurisdiction, the administration of the property of a bankrupt is governed by English law as the *lex fori*². A creditor may prove for any debt due to him from the bankrupt, no matter whether the debt is governed by English law or foreign law³. Of course, it may be necessary to refer to foreign law in order to discover whether a debt governed by a foreign proper law is valid by that law⁴. But, subject to this, a foreigner proving for a foreign debt stands in the same position as an English creditor proving for an English debt⁵. The English court will apply its own rules designed to secure equality as between creditors of the same class, and will compel a creditor who seeks to prove in the English bankruptcy⁶ or who is subject to the jurisdiction of the English court⁷ to bring into the common pool any debt or dividend recovered by him abroad⁸.

The Insolvency Act 1986 contains particular rules as to the effect of bankruptcy on antecedent transactions, such as the effect of a preference, or of a transaction at an undervalue⁹. These permit a court to reopen and reverse a transaction entered into by the bankrupt with another person¹⁰. Although there is no territorial restriction upon who the other person may be, and no express restriction upon the nature or locus of the transaction, if a claim is made under these provisions, it must be shown that there is sufficient connection between the defendant (against whom an order is sought) and England to make it just and convenient in all the circumstances to make the order despite the foreign element¹¹. If the defendant is outside the jurisdiction, the service on him of the proceedings will require the permission of the court; and the grant of permission will depend on, *inter alia*, the strength or otherwise of the connection of the defendant with England¹².

1 This applies equally where English domestic rules have been used to determine jurisdiction and where the European Regulation on Insolvency Proceedings applies. As to the law applicable to insolvency proceedings under the European Regulation on Insolvency Proceedings see para 486 *et seq ante*. As to the European Regulation on Insolvency Proceedings see para 473 note 1 *ante*. As to the meanings of 'England', 'English' and 'English law' see para 4 *ante*.

2 *Re Melbourn, ex p Melbourn* (1870) 6 Ch App 64; *Thurburn v Steward* (1871) LR 3 PC 478; *Re Scheibler, ex p Holthausen* (1874) 9 Ch App 722; *Re Kloebe, Kannreuther v Geiselbrecht* (1884) 28 ChD 175; *Re Doetsch, Matheson v Ludwig* [1896] 2 Ch 836.

3 *Re Melbourn, ex p Melbourn* (1870) 6 Ch App 64; *Re Kloebe, Kannreuther v Geiselbrecht* (1884) 28 ChD 175.

4 See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1177. For the meaning of 'the proper law (of a contract)' see para 349 note 7 *ante*.

5 *Re Scheibler, ex p Holthausen* (1874) 9 Ch App 722; *Re Wiskemann, ex p Trustee* (1923) 92 LJCh 349.

6 *Selkrig v Davies* (1814) 2 Dow 230 at 249, HL; *Re Morton, ex p Robertson* (1875) LR 20 Eq 733; *Re Hooper, Banco de Portugal v Waddell* (1880) 5 App Cas 161, HL.

7 *Sill v Worswick* (1791) 1 Hy Bl 665; *Hunter v Potts* (1791) 4 Term Rep 182; *Phillips v Hunter* (1795) 2 Hy Bl 402.

8 *le except in pursuance of a judgment in rem given by a foreign court: Minna Craig SS Co v Chartered Mercantile Bank of India, London and China* [1897] 1 QB 460, CA.

9 See the Insolvency Act 1986 ss 339-342 (as amended), ss 423-425; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 653 et seq.

10 See *ibid* ss 339, 340, 423; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 653 et seq.

11 *Re Paramount Airways Ltd (in administration)* [1993] Ch 223, [1992] 3 All ER 1, CA.

12 See the Insolvency Rules 1986, SI 1986/1925, r 12.12 (see para 500 text and note 14 ante). See also *Re Paramount Airways Ltd (in administration)* [1993] Ch 223, [1992] 3 All ER 1, CA; *Re Busytoday Ltd, Popely v Lewis* [1992] 4 All ER 61, [1992] 1 WLR 683; *Re Tucker (a bankrupt) (No 2), ex p the Trustee v Langton Investment SA* [1988] 2 All ER 339, [1988] 1 WLR 497; *Reid v Ramlort Ltd* (1998) Times, 14 October, Ct of Sess; *Jyske Bank (Gibraltar) Ltd v Spjeldnaes* [1999] 2 BCLC 101; *Re Banco Nacional de Cuba* [2001] 1 WLR 2039.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/ (4) INDIVIDUAL INSOLVENCY/503. Discharge by reason of an English order.

503. Discharge by reason of an English order.

An order of discharge under an English bankruptcy discharges the debtor from all debts provable in the bankruptcy, irrespective of the law which governs the contract giving rise to the debt¹, because it operates as a release from all debts provable in bankruptcy². In addition, a discharge in accordance with the law which governs the contract or debt is a valid discharge in England³, and the same principle may apply to a voluntary arrangement⁴ under the Insolvency Act 1986⁵.

1 *Royal Bank of Scotland v Cuthbert* (1813) 1 Rose 462; *Gill v Barron* (1868) LR 2 PC 157; *Ellis v M'Henry* (1871) LR 6 CP 228. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See the Insolvency Act 1986 s 281(1); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 642.

3 See paras 365 ante, 504 post.

4 See para 500 note 8 ante.

5 See the Insolvency Act 1986 ss 260, 261; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 107. See also Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1180.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/ (4) INDIVIDUAL INSOLVENCY/504. Effect in England of foreign bankruptcies.

504. Effect in England of foreign bankruptcies.

An English court may not question the jurisdiction of a court seised in accordance with the European Regulation on Insolvency Proceedings¹ or of the Scottish or Northern Irish court to adjudicate a debtor bankrupt². The court will recognise that the courts of a foreign country have jurisdiction over a debtor if he was domiciled in that country at the time of presentation of the petition³, or if he submitted to the jurisdiction of the court by presenting the petition himself⁴ or by appearing in the proceedings⁵. It is possible that further grounds of jurisdictional competence may be recognised as sufficient by the court⁶.

An assignment of a bankrupt's property in Scotland⁷ or Northern Ireland⁸ operates to transfer to the assignee title to of all the debtor's property, whether movable or immovable and wherever situated⁹. The property of the debtor vests in the assignee subject to any charges which are recognised as affecting it by the *lex situs*¹⁰. By contrast, an assignment of a bankrupt's property in any other foreign country which is recognised as jurisdictionally competent¹¹ operates to transfer to the assignee title to the movable (but not to the immovable) property of the debtor situated in England¹². This depends upon the foreign bankruptcy being intended to operate with extra-territorial effect¹³; and the assignment is in any event subject to such charges as bound the movables in the hands of the bankrupt¹⁴. Once there has been such a foreign adjudication, there may still be an English bankruptcy; but if the effect of the foreign adjudication is that there remains no property of the debtor in England, the court is likely to exercise its discretion against the making of such an order¹⁵.

In the event of successive foreign bankruptcies, if under each of these an English court would recognise that there had been an assignment of the movable property of the debtor in England, the earlier in time will prevail¹⁶. The English bankruptcy rules relating to the vesting of property in the trustee where there are successive bankruptcies¹⁷ do not apply if the first bankruptcy takes place in England and the second in a foreign country¹⁸.

A discharge from any debt or liability under the bankruptcy law of a foreign country outside the United Kingdom¹⁹ is a discharge from it in England if (but only if) it operates as a discharge under the law which governs the contract²⁰. Even if the court which makes the order was one which was recognised as having bankruptcy jurisdiction²¹, the effect of any discharge is a matter for the law which governs the contract²².

1 As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

2 See the Insolvency Act 1986 s 426(1). This does not require a court to enforce an order made in a Scottish or Northern Irish bankruptcy in relation to property in England: s 426(2). See also BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 28. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 *Re Blithman* (1866) LR 2 Eq 23; *Re Hayward, Hayward v Hayward* [1897] 1 Ch 905.

4 *Re Davidson's Settlement Trusts* (1873) LR 15 Eq 383; *Re Lawson's Trusts* [1896] 1 Ch 175; *Re Burke, King v Terry* (1919) 54 L Jo 430.

5 *Re Anderson* [1911] 1 KB 896; *Re Craig, Catling v Esson* (1916) 86 LJCh 62.

6 Subject to the European Regulation on Insolvency Proceedings, the question is not one regulated by statute, and authorities under the common law are few. But the courts may well recognise the bankruptcy jurisdiction of a court in whose jurisdiction the debtor carried on business.

7 le under the Bankruptcy (Scotland) Act 1985.

8 le under the Insolvency (Northern Ireland) Order 1989, SI 1989/2405, whose terms are identical to those contained in the Insolvency Act 1986 s 265 (see para 500 ante).

9 le whether in England, Scotland, Northern Ireland or elsewhere. The obligation contained in the Insolvency Act 1986 s 426 (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 28) requiring the rendering of mutual judicial assistance will mean that a Scottish or Northern Irish trustee may easily obtain an effective title to property in England.

10 See *Murphy's Trustee v Aitken* 1983 SLT 78; *Galbraith v Grimshaw* [1910] AC 508, HL. As to the *lex situs* generally see para 380 ante. As to the *lex situs* as it relates to foreign immovables see para 399 post.

11 See the text and notes 3-6 supra.

12 *Solomons v Ross* (1764) 1 Hy BI 131n; *Re Blithman* (1866) LR 2 Eq 23; *Re Davidson's Settlement Trusts* (1873) LR 15 Eq 383; *Re Anderson* [1911] 1 KB 896; *Re Craig, Catling v Esson* (1917) 86 LJCh 62; *Re Burke, King v Terry* (1919) 54 L Jo 430. In relation to immovables situated in England, no assignment will take place (*Cockerell v Dickens* (1840) 3 Moo PC 98), but an English court may authorise the appointment of a receiver of the rents and profits of such immovables (*Re Levy's Trusts* (1885) 30 ChD 119; *Re Osborn, ex p Trustee* [1931-32] B & CR 189). If the country has been designated for the purposes of mutual assistance (see para 501 note 5 ante), such a result may the more easily be achieved.

13 See the cases cited in note 12 supra.

14 *Solomons v Ross* (1764) 1 Hy BI 131n; *Galbraith v Grimshaw* [1910] AC 508, HL.

15 See para 500 ante.

16 *Geddes v Mowat* (1824) 1 Gl & J 414, HL; *Re O'Reardon* (1873) 9 Ch App 74; *Re Anderson* [1911] 1 KB 896; *Re Temple* [1947] Ch 345.

17 See the Insolvency Act 1986 ss 334-335 (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) paras 607-609.

18 *Re Temple, ex p Official Receiver v Official Assignee of Bombay* [1947] Ch 345, [1947] 1 All ER 592. See also *Re Anderson* [1911] 1 KB 896. As to contemporaneous English and foreign bankruptcies see *Re Macfadyen & Co, ex p Vizianagaram Co Ltd* [1908] 1 KB 675.

19 A Scottish or Northern Irish discharge is effective in England. This is said to follow from the fact that it derives its effect in each case from an Act of the United Kingdom Parliament. For the meaning of 'United Kingdom' see para 4 ante.

20 See generally paras 349-365 ante. See also *Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399, CA.

21 See the text and notes 3-6 supra.

22 See *Burrows v Jemino* (1726) 2 Stra 733; *Potter v Brown* (1804) 5 East 124; *Ellis v M'Henry* (1871) LR 6 CP 228; *International Harvester Co Ltd v Zarbok* [1918] 3 WWR 38; *Smith v Buchanan* (1800) 1 East 6; *Bartley v Hodges* (1861) 1 B & S 375; *Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399, CA; *National Bank of Greece and Athens SA v Metliss* [1958] AC 509, [1957] 3 All ER 608, HL. But a discharge from a liability which does not derive from a contract appears to be a good discharge in England provided that the foreign court had (bankruptcy) jurisdiction to make the order: *Phillips v Eyre* (1870) LR 6 QB 1.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(5) CORPORATE INSOLVENCY AND THE WINDING UP OF COMPANIES/505. Jurisdiction of the English court.

(

505. Jurisdiction of the English court.

Subject to certain limitations¹, the High Court has jurisdiction to wind up any company registered in England², whether the company is solvent or insolvent³, and even though it was formed solely to carry on business abroad. It has no jurisdiction to wind up a company registered in Scotland⁴, but may wind up one incorporated in Northern Ireland provided that it has a principal place of business in England⁵.

Subject to the European Regulation on Insolvency Proceedings⁶, the High Court also has jurisdiction to wind up an unregistered company (the definition of which includes a company incorporated outside Great Britain⁷) if there is a sufficient connection between the company and England and there are persons who could benefit from the making of a winding up order⁸, and provided that the company is insolvent; if the company is solvent, it may be wound up by the English court only if the company does not have its seat in a 'Brussels I' Regulation state or a contracting state to the Brussels or Lugano Convention⁹. The grounds upon which an unregistered company may be wound up are that:

- 478 (1) the company is dissolved¹⁰ or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs; or
- 479 (2) the company is unable to pay its debts; or
- 480 (3) the court is of the opinion that it is just and equitable that the company be wound up¹¹.

The court has jurisdiction to wind up an insolvent company which has been dissolved under the law of its place of incorporation; the company is brought back to life for this one purpose¹², and the fact that its assets will already have vested in the Crown as bona vacantia is overridden by the making of the order¹³.

The court also has jurisdiction to wind up an unregistered solvent company if it has its seat in England¹⁴.

These powers of jurisdiction are subject to two important limiting factors. First, in relation to unregistered solvent companies incorporated in another Brussels or Lugano contracting state¹⁵ whose court regards the seat of the company as being within its jurisdiction, both the court of the contracting state and the English court will have jurisdiction to wind the company up, but the English court must decline jurisdiction if a court of the other state is seised of a winding up application first¹⁶. Secondly, in relation to the winding up of unregistered companies, the English court's ability to open main insolvency proceedings is denied under the European Regulation on Insolvency Proceedings where the centre of the debtor's main interests is situated in another member state; and, where main (or principal) proceedings have already been opened in another member state, the English court's ability to open secondary (or ancillary) proceedings is dependent upon the presence of an establishment in the United Kingdom¹⁷.

1 See the text to notes 15-17 infra.

2 Insolvency Act 1986 s 117(1). As to the jurisdiction of the county court see s 117(2). The making of the order is a matter of discretion: see *Re Harrods (Buenos Aires) Ltd (No 2)* [1992] Ch 72, [1991] 4 All ER 348, CA. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

As to the choice of law in winding up proceedings conducted pursuant to English legislation see para 502 ante. The same principles operate, ie English law as the *lex fori* applies to matters of procedure and substance.

3 Exclusive jurisdiction in matters relating to (inter alia) the dissolution of a company is conferred by the 'Brussels I' Regulation and the Brussels and Lugano Conventions on the courts of the country where the body corporate has its seat; they do not apply to proceedings relating to the winding up of insolvent companies: see art 1 para 2, art 22 para 2 of the 'Brussels I' Regulation; art 1 para 2, art 16 para 2 of the Conventions; the text to notes 15-16 infra; and paras 74, 76 ante. However, the European Regulation on Insolvency Proceedings applies to a range of insolvency proceedings including the winding up of insolvent companies: see the text to note 17 infra; and para 474 ante. As to the 'Brussels I' Regulation see para 65 note 1 ante. As to the Brussels Convention see para 65 note 2 ante. As to the Lugano Convention see para 65 note 3 ante. As to references to numbered articles of the Conventions see para 65 note 8 ante. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante. As to where a corporation has its seat for these purposes see para 85 ante.

4 The express provision in the Insolvency Act 1986 s 117(1) does not extend to Scotland. Cf the Insolvency Act 1986 s 426 (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 28); and para 508 post.

5 See *Re A Company (No 007946 of 1993)* [1994] 1 All ER 1007, where the definition of 'unregistered company' in the Insolvency Act 1986 s 220 (as amended) (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1147) was held to extend to a private company incorporated in Northern Ireland.

6 An unregistered company cannot be wound up voluntarily under the Insolvency Act 1986 except in accordance with the European Regulation on Insolvency Proceedings: see the Insolvency Act 1986 s 221(4) (as amended); and para 506 post.

7 See *ibid* s 220 (as amended), which defines 'unregistered companies' as those which are not registered in accordance with the Companies Act 1985, even if they are foreign corporations registered in accordance with the laws of the state of incorporation; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1147. See also *Re Matheson Bros Ltd* (1884) 27 ChD 225; *Re Commercial Bank of South Australia* (1886) 33 ChD 174; *Re A Company (No 007946 of 1993)* [1994] 1 All ER 1007. The Insolvency Act 1986 s 220 (as amended) allows for the winding up of associations formed for gain or profit but it does not allow the winding up of an international organisation as such: *Re International Tin Council* [1989] Ch 309, [1988] 3 All ER 257, CA. For the meaning of 'Great Britain' see para 4 ante.

8 See the Insolvency Act 1986 s 221 (as amended); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 435. See also *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] Ch 112, [1950] 2 All ER 549, CA; *Re A Company (No 00359 of 1987)* [1988] Ch 210, [1987] 3 All ER 137. It is irrelevant that the company had no place of business in England so long as it had formerly conducted business in England (*Banque des Marchands de Moscou (Koupetschesky) v Kindersley* supra; *Re Compania Merabello San Nicholas SA* [1973] Ch 75, [1972] 3 All ER 448), and it is no longer a necessity that the company should have assets in England (*Re A Company (No 00359 of 1987)* supra; approved obiter in *Re Paramount Airways Ltd (in administration)* [1993] Ch 223, [1992] 3 All ER 1, CA).

In *Re Real Estate Development Co* [1991] BCLC 210 (approved in *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116, (2000) Times, 15 March, CA) the relevant principles were summarised and confirmed thus:

- 163 (1) there must be sufficient connection with England which may, but need not necessarily, consist of assets within the jurisdiction;
- 164 (2) there must exist a reasonable possibility, if a winding up order was made, of benefit to those applying for the winding up; and
- 165 (3) one or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise jurisdiction.

The matter in head (1) supra is within the discretion of the trial judge, but a winding up order against a foreign company with no assets within the jurisdiction and no trading connection which is continuing to trade in its country of incorporation and elsewhere worldwide should be made only exceptionally: see *Banco Nacional de Cuba v Cosmos Trading Corp* [2000] 1 BCLC 813, CA. For further illustration of the necessary connection see *Re A Company (No 003102 of 1991)*, *ex p Nyckeln Finance Co Ltd* [1991] BCLC 539; *Re Real Estate Development Co* [1991] BCLC 210; *Re Wallace Smith & Co Ltd* [1992] BCLC 970; *Re Wallace Smith Group Ltd* [1992] BCLC 989. For the former view that it was necessary for assets to be within the jurisdiction see *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* supra; *Re Compania Merabello San Nicholas SA* supra; *Re Eloc Electro-Optieck and Communicatie BV* [1982] Ch 43, [1981] 2 All ER 1111.

9 See note 3 supra. For the meaning of 'contracting state' see para 65 note 5 ante.

10 Or has been dissolved: *Re Family Endowment Society* (1870) 5 Ch App 118; *Re Russian and English Bank* [1932] 1 Ch 663; *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] Ch 112, [1950] 2 All ER 549, CA.

11 See the Insolvency Act 1986 s 221(5); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1151. See also *Re Vanilla Accumulation Ltd* (1998) Times, 24 February, where the 'just and equitable' ground (see head (3) in the text) was invoked to wind up a company whose activities in England were considered to be inherently objectionable as being against the public interest.

The European Regulation on Insolvency proceedings does not apply to unregistered companies wound up on just and equitable grounds.

12 See the Insolvency Act 1986 ss 221(5), 225. See also *Re Russian and English Bank* [1932] 1 Ch 663; *Re Tea Trading Co, K & C Popoff Bros* [1933] Ch 647; *Re Russian Bank for Foreign Trade* [1933] Ch 745; *Russian and English Bank and Florance Montefiore Guedalla v Baring Bros & Co Ltd* [1936] AC 405, [1936] 1 All ER 505, HL; *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] Ch 112, [1950] 2 All ER 549, CA; *Re Azoff-Don Commercial Bank* [1954] Ch 315, [1954] 1 All ER 947.

13 *Re Azoff-Don Commercial Bank* [1954] Ch 315, [1954] 1 All ER 947; *Re Banque Industrielle de Moscou* [1952] Ch 919, [1952] 2 All ER 532; *Russian and English Bank and Florance Montefiore Guedalla v Baring Bros & Co Ltd* [1936] AC 405, [1936] 1 All ER 505, HL. As to bona vacantia see CROWN PROPERTY vol 12(1) (Reissue) para 231 et seq.

14 See note 3 supra; and paras 74, 76, 85 ante.

15 For the meanings of 'Brussels contracting state' and 'Lugano contracting state' see para 65 notes 2-3 ante.

16 See the Brussels Convention art 23; the Lugano Convention art 23; and para 77 ante.

17 See the Insolvency Act 1986 s 117(6). For the meaning of 'the centre of main interests' see para 475 note 5 ante. For the meaning of 'establishment' see para 476 note 9 ante. For the meaning of 'United Kingdom' see para 4 ante. As to jurisdiction to open main proceedings and secondary proceedings under the European Regulation on Insolvency Proceedings see para 476 ante. As to the European Regulation on Insolvency Proceedings generally see para 474 et seq ante.

UPDATE

505 Jurisdiction of the English court

NOTE 16--See *Cambridge Gas Transport v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2006] 3 All ER 829.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(5) CORPORATE INSOLVENCY AND THE WINDING UP OF COMPANIES/506. Scope and effect of an English winding up order.

506. Scope and effect of an English winding up order.

The winding up of a company under the Insolvency Act 1986¹ impresses the property of the company with a trust for its application for the benefit of the persons interested in the winding up². The liquidator must take into his custody all the assets to which the company is or appears to be entitled³, although the court may provide in its order that he is not to act without a direction from the court except for the purpose of getting in English assets and settling a list of English creditors⁴. But as the winding up is a liquidation of the company, as distinct from its purely English affairs, assets collected in will be applied in discharge of English and non-English liabilities⁵; if there is a contemporaneous foreign liquidation, efforts must be made to secure equal treatment of all claimants rather than reserve English assets for English creditors⁶. However, where there is a contemporaneous liquidation in England and in a foreign country, and the European Regulation on Insolvency Proceedings does not apply, the English court will apply the substantive provisions of English insolvency law in relation to the adjudication of claims even if these provisions are in conflict with those of the foreign liquidation⁷.

Once a winding up order has been made, no action may be brought against the company without the permission of the court⁸. Whilst this only applies to proceedings in the United Kingdom, a claimant subject to the personal jurisdiction of the court may be restrained from commencing proceedings against a company in such circumstances, to obtain an inequitable share of the assets overseas⁹. Similarly, attachment, sequestration, distress or execution put into force against the assets of the company after the commencement of the winding up is void¹⁰. This does not apply to executions and so on overseas, but a claimant subject to the personal jurisdiction of the court may be required to surrender the fruits of his foreign execution for the general benefit of all the creditors¹¹.

The territorial scope of certain other provisions of the Insolvency Act 1986 is less clear. The court has jurisdiction to order the public examination of a director of an English company in compulsory liquidation¹², even though the director is resident outside the jurisdiction¹³; and there is discretion as to the manner of service of the notice on him¹⁴. The provision can also be invoked against a director of a foreign company wound up in an English court¹⁵. It is also possible for a liquidator to seek an order that a transaction be set aside on the ground that it was entered into with another person at an undervalue¹⁶. The court will exercise its discretion in favour of making such an order only if the connections with England are sufficiently strong for this to be appropriate¹⁷.

If a foreign company is being wound up in England and also in its country of incorporation, and surplus assets remain in the hands of the liquidator after the creditors have been paid, these will be normally be handed over to the foreign liquidator¹⁸.

1 An unregistered company may be wound up under the Insolvency Act 1986 Pt IV (ss 73-218) (as amended) (see s 221(1)), but it cannot be wound up voluntarily under the Insolvency Act 1986 except in accordance with the European Regulation on Insolvency Proceedings: see the Insolvency Act 1986 s 221(4) (amended by the Insolvency Act 1986 (Amendment) (No 2) Regulations 2002, SI 2002/1240, regs 3, 9). See also para 505 text and note 17 ante. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

2 *Re Oriental Inland Steam Co, ex p Scinde Rly Co* (1874) 9 Ch App 557. See Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) p 1132.

In the case of property located outside the jurisdiction, the private international law of the situs generally determines whether decisions taken in English proceedings will have effect there. However, where the property

is situated within the European Union, and the European Regulation on Insolvency Proceedings applies, its provisions will, of course, prevail. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 See the Insolvency Act 1986 s 144(1); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 573.

4 *Re Hibernian Merchants Ltd* [1958] Ch 76, [1957] 3 All ER 97; *Re International Tin Council* [1989] Ch 309, [1988] 3 All ER 257, CA.

5 *Re Azoff-Don Commercial Bank* [1954] Ch 315, [1954] 1 All ER 947; *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196; *Re Bank of Credit and Commerce International SA* [1992] BCLC 570; *Re Bank of Credit and Commerce International SA (No 2)* [1992] BCLC 579. This presupposes that the foreign claims are valid according to their governing law.

6 See *Re Bank of Credit and Commerce International SA* [1992] BCLC 570 at 577. See also Dicey and Morris *The Conflict of Laws* (13th Edn, 2000) pp 1132-1134; and para 508 post.

7 *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, [1996] 4 All ER 796.

8 See the Insolvency Act 1986 s 130(2). Between the presentation of the petition and the making of the order the position is governed by s 126(1): see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 887.

9 *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196; *Re North Carolina Estate Co* (1889) 5 TLR 328. A secured creditor will not be impeded in the enforcement of his security: *Minna Craig SS Co v Chartered etc Bank* [1897] 1 QB 55; 460, CA. For the meaning of 'United Kingdom' see para 4 ante.

10 See the Insolvency Act 1986 s 128(1); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 888.

11 *Re Oriental Inland Steam Co, ex p Scinde Rly Co* (1874) 9 Ch App 557; *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196.

12 See under the Insolvency Act 1986 s 132: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) para 513.

13 *Re Seagull Manufacturing Co Ltd (in liquidation)* [1993] Ch 345, [1993] 2 All ER 980, CA; cf *Re Tucker (RC) (a bankrupt), ex p Tucker (KR)* [1990] Ch 148, [1988] 1 All ER 603, CA.

14 Insolvency Rules 1986, SI 1986/1925, r 12.12; *Re Seagull Manufacturing Co Ltd (in liquidation)* [1993] Ch 345, [1993] 2 All ER 980, CA; *Re Busytoday Ltd, Popely v Lewis* [1992] 4 All ER 61, [1992] 1 WLR 683.

15 See the Insolvency Act 1986 ss 221(1), 229(1); *Re Busytoday Ltd, Popely v Lewis* [1992] 4 All ER 61, [1992] 1 WLR 683; and para 505 text and notes 6-9 ante.

16 See the Insolvency Act 1986 ss 238, 239; *Re Paramount Airways Ltd (in administration)* [1993] Ch 223, [1992] 3 All ER 1, CA; *Barclays Bank plc v Homan* [1993] BCLC 680; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 654; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 844.

17 *Re Paramount Airways Ltd (in administration)* [1993] Ch 223, [1992] 3 All ER 1, CA.

18 *Re Commercial Bank of South Australia* (1886) 33 ChD 174; *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196.

UPDATE

506 Scope and effect of an English winding up order

NOTE 14--SI 1986/1925 r 12.12 amended: SI 2005/527.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(5) CORPORATE INSOLVENCY AND THE WINDING UP OF COMPANIES/507. Scope and effect of a foreign winding up order.

507. Scope and effect of a foreign winding up order.

The European Regulation on Insolvency Proceedings governs the mutual recognition, between member states of the European Union, of judgments and of the powers and duties of liquidators or temporary administrators appointed under its provisions¹.

Otherwise, since the law of the place of incorporation determines who is entitled to act on behalf of a company², it appears to follow that a liquidator of a company appointed under the law of the place of incorporation will be recognised by the English courts³. It is open to the courts to recognise the authority of a liquidator appointed under another law⁴.

1 As to the scope and effect of judgments under the European Regulation on Insolvency Proceedings see para 498 ante. As to the powers and duties of liquidators and temporary administrators appointed thereunder see paras 484-485 ante. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

2 See para 465 ante.

3 *Bank of Ethiopia v National Bank of Egypt and Ligouri* [1937] Ch 513; *Baden Delvaux and Lecuit v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1983] BCLC 325; *Felixstowe Dock and Rly Co v United States Lines Inc* [1989] QB 360, [1988] 2 All ER 77.

4 For a possible analogy see *Re A Company (No 00359 of 1987)* [1988] Ch 210, [1987] 3 All ER 137; *Re A Company (No 003102 of 1991)*, *ex p Nyckeln Finance Co Ltd* [1991] BCLC 539.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(5) CORPORATE INSOLVENCY AND THE WINDING UP OF COMPANIES/508. Judicial co-operation in multi-national insolvencies.

508. Judicial co-operation in multi-national insolvencies.

It is clear that the insolvency of a company may have important ramifications in other jurisdictions.

The European Regulation on Insolvency Proceedings provides rules for the co-ordination of concurrent proceedings within the European Union where that Regulation applies¹. Where the Regulation does not apply, the Insolvency Act 1986 creates a formal statutory framework for inter-state co-operation in the winding up of insolvent companies². Accordingly, courts in the United Kingdom have a statutory obligation to assist each other in matters of winding up³. In relation to countries outside the United Kingdom, the Secretary of State may designate countries as those to which assistance is also to be extended⁴. The courts of such a country may make a request to the English court for assistance, and the English court may give assistance by applying English insolvency law, or the provisions of the insolvency law of the foreign country⁵. But the request must be made by a foreign court: a foreign liquidator may not himself apply directly to the English court⁶.

1 See para 477 et seq ante. The concept of secondary proceedings contained in the European Regulation on Insolvency Proceedings (as to which see para 478 et seq ante) equates to the English concept of ancillary proceedings. However, the European Regulation on Insolvency Proceedings requires an 'establishment' to be situated in the jurisdiction before secondary proceedings can be opened (see para 476 ante) whereas English law merely requires sufficient connection between the company and England (see para 505 ante). As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

2 See the Insolvency Act 1986 s 426 (as amended) (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 28); and the text and notes 3-5 infra.

There was a considerable degree of flexibility at common law, both in the immediate context of insolvency, and in other contexts (such as the general application of the Evidence (Proceedings in Other Jurisdictions) Act 1975: see CIVIL PROCEDURE vol 11 (2009) PARA 1055 et seq). It appears that there is no reason in principle why an English liquidator may not seek assistance from the courts (or otherwise under the law) of a foreign country, but his power to do so will be subject to the control of the English court: see *Re Bank of Credit and Commerce International SA* [1992] BCLC 570; *Re Bank of Credit and Commerce International SA (No 3)* [1993] BCLC 106; *Re Maxwell Communications Corp plc (No 2)* [1994] 1 All ER 737, [1993] 1 WLR 1402; *Barclays Bank v Homan* [1993] BCLC 680.

3 Insolvency Act 1986 s 426(4). For the meaning of 'United Kingdom' see para 4 ante.

4 See *ibid* s 426(4), (11); the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986, SI 1986/2123 (as amended); para 501 note 5 ante; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1029. As to the Secretary of State see para 126 note 1 ante.

5 See the Insolvency Act 1986 s 426(5). See also *Re Dallhold Estates (UK) Pty Ltd* [1992] BCLC 621, [1992] BCC 394; *Re Bank of Credit and Commerce International SA (No 9)* [1994] 3 All ER 764; *Hughes v Hannover Rückversicherungs-AG* [1997] 1 BCLC 497, CA. English insolvency law, in this context, means any provision made by or under the Insolvency Act 1986, and certain provisions of the Company Directors Disqualification Act 1989: see the Insolvency Act 1986 s 426(10)(a)-(c) (as amended); BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 728; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) para 1029. See also the Companies Act 1989 s 183; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) para 28. In relation to the law of a foreign country, insolvency law means so much of that foreign law as corresponds to the English law on insolvency: Insolvency Act 1986 s 426(10)(d). For these purposes, insolvency law includes the court's ancillary jurisdiction where it assists in connection with the insolvency proceedings, such as the court's power to grant injunctive relief: *Hughes v Hannover Rückversicherungs-AG* supra. The assistance to be provided, if any, is discretionary: *Re Bank of Credit and Commerce International SA (No 9)* supra; *Hughes v Hannover Rückversicherungs AG* supra (the discretion of the court should be exercised to give the particular

assistance requested unless there is some good reason for not doing so). See also *England v Smith* [2001] Ch 419, CA, sub nom *Re Southern Equities Corp Ltd (in liquidation)* [2000] 2 BCLC 21, CA (when faced with a request from a foreign court for assistance, the English court is entitled to apply either English law or the law of the requesting court in determining whether to grant the request for assistance; and once the English court has chosen to apply foreign law, it must direct itself by reference to that law, even if the order might be considered oppressive, though not contrary to public policy, under English law); *Re Focus Insurance Co Ltd* [1997] 1 BCLC 219, [1996] BCC 659 (where the English court declined to give effect to a request for assistance from a foreign court when the assistance sought would, if granted, interfere with the conduct of insolvency proceedings in England).

Where a company is involved in insolvency proceedings abroad, it has been said that the English courts will do their utmost to co-operate with those proceedings and to avoid any action which might disturb the orderly administration of those proceedings: *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112. See also *Barclays Bank v Homan* [1993] BCLC 680; cf *Felixstowe Dock and Rly Co v United States Lines Inc* [1989] QB 360, [1988] 2 All ER 77.

6 See *Re Dallhold Estates (UK) Pty Ltd* [1992] BCLC 621, [1992] BCC 394; *Re Bank of Credit and Commerce International SA (No 9)* [1994] 3 All ER 764; *Re Wallace Smith & Co Ltd* [1992] BCLC 970.

Halsbury's Laws of England/CONFLICT OF LAWS (VOLUME 8(3) (REISSUE))/11. INSOLVENCY/(5) CORPORATE INSOLVENCY AND THE WINDING UP OF COMPANIES/509. Receivership.

509. Receivership.

A receiver appointed under the law of any other part of the United Kingdom¹ in respect of the property of a corporation, and in consequence of the corporation having created a charge which, as created, was a floating charge, may exercise his powers in England². A receiver appointed otherwise than under the law of another part of the United Kingdom in respect of the property of the corporation, and in consequence of the corporation having created a charge which, as created, was a floating charge, may exercise his powers in England if he is so authorised by the law of the place of incorporation³.

The European Regulation on Insolvency proceedings does not apply to administrative receivership⁴.

1 For the meaning of 'United Kingdom' see para 4 ante.

2 Administration of Justice Act 1977 s 7; Insolvency Act 1986 s 72. As to the meanings of 'England', 'English' and 'English law' see para 4 ante.

3 The law of the place of incorporation determines who may act on behalf of the corporation: see para 465 ante. See also *Cretanor Maritime Co Ltd v Irish Maritime Management Ltd* [1978] 1 WLR 966. For the law in relation to floating charges and their registration see COMPANIES vol 15 (2009) PARA 1269 et seq.

4 The procedure does not fall within the definition of 'collective insolvency proceedings' to which the European Regulation on Insolvency Proceedings applies: see para 475 note 1 ante. As to the European Regulation on Insolvency Proceedings see para 473 note 1 ante.

